



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



Gen. A. E. C. 213

LL
OW.U.K!
100

0-10.

1000000





REPORTS OF CASES

HEARD AND DETERMINED

BY

THE LORD CHANCELLOR,

AND THE

Court of Appeal in Chancery.

BY

J. P. DE GEX, Esq.,
OF LINCOLN'S INN;

S. MACNAGHTEN, Esq.,
OF THE MIDDLE TEMPLE;

AND

A. GORDON, Esq., OF THE INNER TEMPLE;
BARRISTERS-AT-LAW.



THE CASES IN THIS VOLUME BEFORE THE LORD CHANCELLOR
ARE REPORTED BY

MESSRS. MACNAGHTEN & GORDON;

AND

THOSE BEFORE THE LORDS JUSTICES OF THE COURT OF APPEAL BY
MR. DE GEX.



VOL. II.

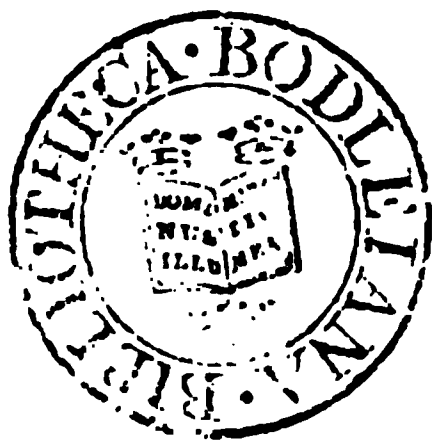
1852.



LONDON:

W. G. BENNING & CO., 43, FLEET STREET;
STEVENS & NORTON, 26, BELL YARD, LINCOLN'S INN:
Law Booksellers and Publishers.

MD CCCLIII.



LONDON:
WILLIAM STEVENS, PRINTER, 37, BELL YARD,
LINCOLN'S INN.

LORD ST. LEONARDS, *Lord Chancellor.*

SIR JOHN ROMILLY, *Master of the Rolls.*

SIR JAMES LEWIS KNIGHT BRUCE,	}	<i>Lords Justices.</i>
LORD CRANWORTH,		

SIR GEORGE JAMES TURNER,	}	<i>Vice-Chancellors.</i>
SIR RICHARD TORIN KINDERSLEY,		
SIR JOHN STUART,		

SIR FREDERICK THESIGER, *Attorney-General.*

SIR FITZROY KELLY, *Solicitor-General.*

A

TABLE

OF THE

NAMES OF CASES REPORTED

IN THIS VOLUME.

A	Page		Page
ADBY <i>v.</i> Arnold . . .	432	Brenan <i>v.</i> Preston . . .	813
Atkinson, In re . . .	140	Broadhurst, Ex parte, In re	
——— <i>v.</i> Gylby . . .	670	Broadhurst . . .	953
——— <i>v.</i> Parker . . .	221	Brownrigg, Navulshaw <i>v.</i> . .	441
Attorney - General <i>v.</i> The		Bryant, Owen <i>v.</i> . . .	697
Mayor &c. of Exeter . .	507	Burt, Edwards <i>v.</i> . . .	55
		Busk, Lee <i>v.</i> . . .	810
		C	
B		Callender, Wright <i>v.</i> . . .	652
Barlow, Ex parte, In re Ma-		Cape's Executor's Case, In	
rygold . . .	921	re Monmouthshire and Gla-	
Barnard, In re, Ex parte		morganshire Banking Com-	
Wetherell . . .	359	pany . . .	562
Barrington <i>v.</i> Liddell . . .	480	Carne, In re, Ex parte Bird .	963
Batten, Jones <i>v.</i> . . .	111	Carter, Coope <i>v.</i> . . .	292
Beach, Jones <i>v.</i> . . .	886	Castelli, In re, Ex parte Brag-	
Beck, Clowes <i>v.</i> . . .	731	giotti . . .	964
Bell, Blann <i>v.</i> . . .	775	Cheetham, Ex parte, In re	
Belton, In re, Ex parte Eyre	946	Cheetham . . .	223
Bird, Ex parte, In re Carne	963	Child <i>v.</i> Elsworth . . .	679
Blakeney <i>v.</i> Dufaur . . .	771	Chorley Waterworks Com-	
Blann <i>v.</i> Bell . . .	775	pany, The Mayor, &c. of	
Bliss, Dean of Ely <i>v.</i> . . .	459	Liverpool <i>v.</i> . . .	852
Bodenham <i>v.</i> Hoskyns . . .	903	Clowes <i>v.</i> Beck . . .	731
Bolton <i>v.</i> Powell . . .	1	Cobb, Enthoven <i>v.</i> . . .	632
Boulton, Pidcock <i>v.</i> . . .	898	Coope <i>v.</i> Carter . . .	292
Bowen <i>v.</i> Price . . .	899	Copeland, Ex parte, In re	
Bradshaw, Ex parte, In re		Copeland . . .	914
Dennison's Trusts . . .	900	Coventry, Earl of, Sheffield <i>v.</i>	551
Braggiotti, Ex parte, In re		Cox <i>v.</i> Dolman . . .	592
Castelli . . .	964	Crosfield's Case, In re North	

TABLE OF CASES REPORTED.

	Page		Page
of England Joint Stock Banking Company . . .	128	Eyre, Ex parte, In re Belton	946
Crosthwaite, In re, Ex parte Turner	927	Eyton, Richardson v. . . .	79
Currie, Lake v.	536		
Curties, Ex parte, In re Curties	255		
		F	
D		Farley, In re, Ex parte Danks	936
Danks, Ex parte, In re Far- ley	936	Fawcett's Patent, In re . .	439
Davenport v. Stafford . . .	901	Fowke, In re, Ex parte Sparrow	907
Davies v. Davies	51	Francis v. Francis	73
Dennison's Trusts, In re, Ex parte Bradshaw	900		
Dering, Monypenny v. . . .	145	G	
Direct Exeter, Plymouth, and Devonport Railway Company, In re, Ex parte Woolmer	665	Gaby, Stump v.	623
Dolman, Cox v.	592	Gilbart, Milne v.	715
Dufaur, Blakeney v.	771	Glass v. Richardson	658
—, Ex parte, In re Dufaur	246	Great Western Extension Atmospheric Railway Com- pany, In re, Wryghte's Case	636
Dunkley v. Dunkley	390	Gylby, Atkinson v.	670
Durnford, Miles v.	641		
Dyke v. Rendall	299	H	
		Hall's Estate, In re	748
E		Hamer's Devises' Case, In re St. George's Steam Packet Company	366
Eastern Counties Junction and Southend Railway Company, In re, Mainwar- ing's Case	66	Harrison v. Round	190
Edwards v. Burt	55	Hart v. Tulk	300
Egremont v. Egremont . . .	730	Helling, Sims v.	291
Elsworth, Child v.	679	Hill, Wilton v.	807
Ely, Dean of, v. Bliss	459	Holme's Case, In re North of England Joint Stock Bank- ing Company	113
Enthoven v. Cobb	632	Horlock v. Horlock	644
Entwisle, In re, Ex parte Kennedy	228	Hoskyns, Bodenham v. . . .	903
Evans, Turner v.	740	Hughes v. Morris	349
—, Ex parte, In re Wass	948	Hyde, Plowden v.	684
Exeter, The Mayor, &c. of, Attorney-General v. . . .	507		
		J	
		Jackson, Kent v.	49

TABLE OF CASES REPORTED.

vii

	Page		Page
Jones <i>v.</i> Batten	111	ganshire Banking Company, In re, Cape's Executor's Case	562
— <i>v.</i> Beach	886	Monypenny <i>v.</i> Dering	145
Jordan, Money <i>v.</i>	318	Morris, Hughes <i>v.</i>	349
K		Mousley, Yeatman <i>v.</i>	220
Kennedy, Ex parte, In re Entwisle	228	Myers <i>v.</i> Perigal	599
Kent <i>v.</i> Jackson	49	N	
Kerr <i>v.</i> The Middlesex Hos- pital	576	Navulshaw <i>v.</i> Brownrigg	441
L		Newall <i>v.</i> Wilson	282
Lake <i>v.</i> Currie	536	Nicholas's Assignees, Ex parte, In re Nicholas	271
Lee <i>v.</i> Busk	810	Noble, In re	280
—, Corporation of Roches- ter <i>v.</i>	427	North of England Joint Stock Banking Company, In re, Crosfield's Case	128
Le Page, Ostell <i>v.</i>	892	— Holme's Case	113
Liddell, Barrington <i>v.</i>	480	Norton <i>v.</i> White	678
Liverpool, The Mayor, &c. of, <i>v.</i> The Chorley Waterworks Company	852	O	
Lowes <i>v.</i> Lowes	784	Ostell <i>v.</i> Le Page	892
M		Owen <i>v.</i> Bryant	697
Macaulay, Price <i>v.</i>	339	Oxford, Worcester, and Wolverhampton Railway Company, Sparrow <i>v.</i>	94
McCalmont <i>v.</i> Rankin	403	— Ward (Lord) <i>v.</i>	750
Mainwaring's Case, In re Eastern Counties Junc- tion and Southend Rail- way Company	66	P	
Martin <i>v.</i> Pycroft	785	Parker, Atkinson <i>v.</i>	221
Martyn, Ex parte, In re Martyn	225	Pemberton, Ex parte, In re Tyther	960
Marygold, In re, Ex parte Barlow	921	Perigal, Myers <i>v.</i>	599
Maxwell <i>v.</i> Maxwell	705	Pidcock <i>v.</i> Boulton	898
Meux's Executors' Case, In re Royal Bank of Australia	522	Plowden <i>v.</i> Hyde	684
Middlesex Hospital, Kerr <i>v.</i>	576	Powell, Bolton <i>v.</i>	1
Miles <i>v.</i> Durnford	641	Preece & Evans's Case, In re Rugby, Warwick, and Worcester Railway Com- pany	374
Milne <i>v.</i> Gilbert	715	Preston, Brenan <i>v.</i>	813
Money <i>v.</i> Jordan	318	Price, Bowen <i>v.</i>	899
Monmouthshire and Glamor-		— <i>v.</i> Macaulay	339
		Pycroft, Martin <i>v.</i>	785

	Page		Page
R			
Rankin, McCalmont <i>v.</i>	403	Staner, Ex parte, In re Staner	263
Rendall, Dyke <i>v.</i>	209	Stour Valley Railway Com-	
Richardson <i>v.</i> Eyton	79	pany, The Shrewsbury and	
———, Glass <i>v.</i>	658	Birmingham Railway Com-	
Robinson's Executor's Case,		pany <i>v.</i>	866
In re Royal Bank of Aus-		Stump <i>v.</i> Gaby	623
tralia	517	Swindell, Ex parte	91
Rochester, Corporation of,		T	
<i>v.</i> Lee	427	Tulk, Hart <i>v.</i>	300
Round, Harrison <i>v.</i>	190	Turnbull <i>v.</i> Warne	281
Royal Bank of Australia, In re,		Turner, Ex parte, In re	
Meux's Executors' Case	522	Crosthwaite	927
—— Robinson's Executor's		—— <i>v.</i> Evans	740
Case	517	—— <i>v.</i> Turner	28
Rufford, Ex parte, In re Ruf-		Tyther, In re, Ex parte Pem-	
ford	234	berton	960
Rugby, Warwick, and Wor-		V	
cester Railway Company,		Vines & Hobbs, In re, Ex	
In re, Preece & Evans's		parte Shackell	842
Case	374	W	
S		Ward (Lord) <i>v.</i> The Oxford,	
St. George's Steam Packet		Worcester, and Wolver-	
Company, In re, Hamer's		hampton Railway Com-	
Devises' Case	366	pany	750
St. James's Club, In re	383	Warne, Turnbull <i>v.</i>	281
Scrivener <i>v.</i> Smith	399	Wass, In re, Ex parte Evans	948
Shackell, Ex parte, In re		Waugh's Trust, In re	279
Vines & Hobbs	842	Wetherell, Ex parte In re	
Sheffield <i>v.</i> The Earl of Co-		Barnard	359
ventry	551	White, Norton <i>v.</i>	678
Sherlock, Ex parte, In re		Wilson, Newall <i>v.</i>	282
Sherlock	269	Wilton <i>v.</i> Hill	807
Shrewsbury and Birmingham		Woolmer, Ex parte, In re The	
Railway Company <i>v.</i> The		Direct Exeter, Plymouth,	
Stour Valley Railway		and Devonport Railway	
Company	866	Company	665
Sims <i>v.</i> Helling	291	Wright <i>v.</i> Callender	652
Smith, Scrivener <i>v.</i>	399	Wryghte's Case, In re The	
Sparrow, Ex parte, In re		Great Western Extension	
Fowke	907	Atmospheric Railway	
—— <i>v.</i> The Oxford, Worces-		Company	636
ter, and Wolverhampton		Wylde, In re	724
Railway Company	94	Y	
Stafford, Davenport <i>v.</i>	901	Yeatman <i>v.</i> Mousley	220

REPORTS

OF

CASES

ARGUED AND DETERMINED

1852.

IN THE

HIGH COURT OF CHANCERY.

BOLTON *v.* POWELL.

March 11, 12.

HOWARD *v.* EARLE.

THIS was an appeal from a decision of the Master of the Rolls. The case is reported in the 14th volume of Mr. Beavan's Reports, p. 275 ; but as the decisions below and on the appeal proceeded upon different grounds, Before *The*
LORDS JUSTICES.
An administrator of an
intestate died
in 1817 in-

debted to a large amount in respect of his receipts as administrator, but leaving sufficient personal estate to pay this amount, and also leaving freehold estates. In the same year a suit was instituted for the administration of his personal estate, and in 1832, it appeared from the report in that suit, that his personal estate had been misapplied, and that his executor had become bankrupt. Thereupon, and in the same year (1832), an administratrix *de bonis non* of the intestate, instituted a suit against the administrator's heir and the sureties, in the usual administration bond, and against the representatives of the Archbishop (who had died), praying to have the benefit of the bond, and to charge by means of it the administrator's freehold estates. No decree was made in this suit, the Plaintiff having married in 1838, and having died in 1847, without the suit having ever been revived. In 1848, another of the next of kin who had been a Defendant to the suit of 1832, took out administration *de bonis non* of the intestate, and filed a bill of revivor and supplement claiming to have the benefit of the suit of 1832.

Held, that the suit of 1832 must be considered as having been abandoned, and that the suit of 1848 must be considered an original suit, and as such barred by length of time and laches.

Quære. Whether the circumstance of the administrator dying largely indebted to the intestate's estate, was a breach of condition of the bond.

Quære. Whether the suit of 1832 was in its nature one which it was competent for the Plaintiff in that of 1848 to revive.

Quære. Whether either suit could be maintained, the ordinary's personal representative not having declined to lend his name in an action.

1852.
 BOLTON
 v.
 POWELL.

grounds, a few additional facts are necessary to be stated.

In 1814 one *David Bolton* died intestate, leaving seven children, four grandchildren, children of a deceased daughter, and two grandchildren, children of a deceased son, his next of kin. In *July* in that year, letters of administration of his estate were granted to his son Captain *William Bolton*, who, with two sureties named *Leopard* and *Cook*, entered into the usual administration bond to the then Archbishop of *Canterbury*.

In 1817 Captain *W. Bolton* died, there being at that time due from him 6695*l.* in respect of his receipts on account of the intestate's estate. He left personal estate sufficient to answer this demand, and also real estate, and made a will appointing Mr. *Cook*, the surety in the bond, his executor.

In 1817 one of the next of kin of *David Bolton* instituted a suit of *Bolton v. Cook*, to obtain payment from the personal estate of Captain *W. Bolton* of the balance due from him as administrator.


In 1818 a suit of *Smith v. Cook* was instituted by a creditor for the same object.

In 1818 administration *de bonis non* of the intestate were granted to *Louisa Bolton*, one of his next of kin, and after her death, similar letters were granted successively to two other next of kin, and in 1829 to a fourth named *Charlotte Bolton*.

In 1819 the usual decree for accounts was made in *Bolton v. Cook*, and in 1820 a similar decree in *Smith v. Cook*.

In

In 1826 Mr. *Cook* became bankrupt, and in 1828 obtained his certificate.

1852.

 BOLTON
 v.
 POWELL

In *March* 1832, a decree upon further directions was made in *Bolton v. Cook*, and it appeared that all the personal estate of Captain *W. Bolton* had been applied, and that no provision had been made for payment of the balance due from his estate to that of the intestate, although his personal estate had been, if properly administered, sufficient to make this payment.

Between *April* 1832, and *July* in that year, Mrs. *Howard*, one of the intestate's next of kin, bought up the shares of all the others, except that of Captain *W. Bolton* and one other. Among the shares thus bought by her was that of *Charlotte Bolton*, the then administratrix *de bonis non*, who by the assignment authorised Mrs. *Howard* to sue in her name.

In *December* 1832, the bill in the first of the above-named suits was instituted by *Charlotte Bolton*, as one of the next of kin, and as the administratrix *de bonis non* of *David Bolton*, on behalf of herself and all other his next of kin, against Captain *W. Bolton's* personal representatives, against Messrs. *Leopard* and *Cook* (the sureties in the administration bond) and against the legal personal representative of the Archbishop of *Canterbury*, the obligee then deceased, praying for a declaration that 5795*l.* which was the amount of *David Bolton's* assets received by Captain *W. Bolton* and unaccounted for, was a specialty debt under the bond, and that the representative of the late Archbishop might be declared to be a trustee under the bond for the benefit of *David Bolton's* estate, and that the real estate of Captain *W. Bolton* might be applied in payment of the amount due upon the bond. No mention was made in this bill

1852.
 BOLTON
 v.
 POWELL.

of *Charlotte Bolton* having assigned all her beneficial interest.

In 1836 this cause came on to be heard before Lord *Langdale*, when it was ordered to stand over, with leave to amend, an objection having been taken and allowed, for want of parties, on the ground that the other next of kin and the assignees of *Cook* were not before the Court. The bill was amended in the same year by making other next of kin, including Mrs. *Howard*, parties.

In 1838 *Charlotte Bolton* married a Mr. *Romanel*, and in 1847 she died without having revived the suit.

In 1848 Mrs. *Howard* took out administration *de bonis non* of *David Bolton*, and in the same year instituted the second of the above-named suits, by a bill purporting to be a bill of revivor and supplement to the bill of 1832, and praying the benefit of that suit, and of the relief thereby sought.

The other facts of the case appear sufficiently from the judgments.

Mr. *Roupell* and Mr. *Glasse*, for the Appellant.

The arguments were in substance the same as those relied upon below. In addition to the cases cited below, *Godwin v. Knight* (a), and *Archbishop of Canterbury v. Robertson* (b), and *Archbishop of Canterbury v. Tappan* (c), were referred to.

Mr. *Hoare* for the heiress of Captain *W. Bolton*.


There

(a) 1 *Robertson's Eccl. Rep.*
 652.

(b) 1 *Crompt. & M.* 690.

(c) 8 *B. & C.* 151.

There has been no assignment of the bond. The Ecclesiastical Court has the control over it. It has been decided that there can be no proceedings at law or in equity without the bond, because the Metropolitan's consent is necessary to any proceedings upon it.

1852.

 BOLTON
 v.
 POWELL.

[*The* LORD JUSTICE LORD CRANWORTH.—Do you argue that the obligation is only to account if called on by the Metropolitan?

The LORD JUSTICE KNIGHT BRUCE.—Suppose the bond destroyed by fire. Is the leave of the Ecclesiastical Court required for any other reason than because proferret is required of the bond, if in existence? His Lordship referred to the following passage of the judgment of *Tindal*, C. J., in *Archbishop of Canterbury v. Tubb* (a). “Though Lord *Mansfield* says, that to those who have a right, it is *ex debito justitiæ* to grant the liberty of suing in the Archbishop's name, that must mean subject to some control in the Ecclesiastical Court, otherwise the Archbishop might without any default on his part be rendered liable to the costs of innumerable actions. The proper way to proceed would be by *mandamus*.”]

That passage if correctly reported would seem to intimate that there may be a *mandamus*. Still it recognises the control of the Ecclesiastical Court over the proceedings. And I submit, that although the bond were destroyed, still the next of kin could not sue upon it without leave of the Ecclesiastical Court.

[*The* LORD JUSTICE LORD CRANWORTH referred to *Archbishop of Canterbury v. House* (b).]

No

(a) 3 *Bing. N. C.* 794.

(b) *Cowp.* 140.

1852.
 BOLTON
 v.
 POWELL.

No reason is given why an action was not brought upon the bond, except the death of one of the obligors. That is not a sufficient reason; *Rose v. Clarke* (a), and *Wilson v. Short* (b).

[*The LORD JUSTICE KNIGHT BRUCE*.—It may perhaps be true that the assignee of a bond cannot as a matter of course sue in equity the obligor and the obligee.]

Collusion or some other special circumstance must exist; *Barker v. Birch* (c), *Hammond v. Messenger* (d).

He also cited *Burroughs v. Elton* (e).

Mr. *Shadwell* for the executors of the late Archbishop of *Canterbury*, submitted to act as the Court should direct.

Mr. *Willcock*, for the executors of Mr. *Leopard*.

When the suit of *Bolton v. Powell* was instituted no sanction had been obtained from the Ecclesiastical Court. It cannot receive validity from a subsequent event. The right to sue arises from the authority given by the ordinary, who is not a mere trustee. Moreover, the condition of the bond has not been broken, for it does not specify any particular time within which the assets are to be administered.

Mr. *Lewis* for another Defendant.

Mr. *Glasse* in reply.

Cur ad. vult.

The

(a) 1 Y. & C. C. C. 534.
 (b) 6 Hare, 366.
 (c) 1 De G. & S. 376.

(d) 9 Sim. 327.
 (e) 11 Ves. 29.

The LORD JUSTICE KNIGHT BRUCE.

1852.

BOLTON

v.

POWELL.

April.

This case presents several questions, of which if all are not difficult, some at least have appeared to me to be so. Even at the outset it may be matter of reasonable argument, whether it is constituted of one cause or two, or in other words, whether Mr. and Mrs. *Howard*, the only Plaintiffs before us, are entitled to consider the litigation as having subsisted from some time in the year 1832, (when a bill, now, effectually or ineffectually, properly or improperly, before the Court, was filed by a lady called *Charlotte Bolton*, not now living,) or only from some time in 1848, when the actual Plaintiffs filed theirs,—a question which in this place I mention as one arising merely upon the frame and nature of the earlier bill, and the state in which the suit, begun by it, was, when it became abated; and not upon any other circumstance. But it is perhaps a point of importance to the actual Plaintiffs, since if they cannot avail themselves of the bill of 1832, and ought to be considered as having commenced an original litigation in 1848, their claim is defeated by lapse of time and laches (to say nothing of the effect of any statute), as a short statement of the material or leading facts of the case will plainly shew.

The object of the bill of 1832 was, and that of the bill of 1848 is, to enforce against the personal assets of a deceased gentleman named *Leopard*, and the real assets of Captain *William Bolton*, also deceased, an administration bond in what is, I believe, the usual form, executed by them to an Archbishop of *Canterbury*, who has been many years dead, upon the occasion of letters of administration of the effects of an intestate being granted by his Prerogative Court.

The Plaintiffs proceed on the basis or assumed basis,
that

1852.
 BOLTON
 v.
 POWELL.

that Captain *William Bolton*, who was the administrator, died indebted to the intestate's estate—that the debt remains undischarged—that the personal estate of Captain *William Bolton* has been exhausted or lost—and that there have been breaches, or has been at least one breach, of the condition of the bond, such as to give a title at law to judgment accordingly, and execution for substantial damages. But, whether there has been in fact any breach of the condition, or at least any such breach of it as to give a title at law to execution for substantial damages I find it not improper to say that (circumstanced as the case is) I doubt,—a doubt founded, at least, upon the authorities, if not on principle also.


The intestate was Mr. *David Bolton*, who died in the year 1813 or 1814. The administrator, Captain *William Bolton*, was his son, and one of his next of kin. Of the sureties who joined in the bond, one, as I have said, was Mr. *Leopard*, the other, Mr. *Harry Cook*. The letters of administration and the bond were dated respectively in 1814 and 1815, or one of those years.

Captain *William Bolton* died in the year 1817, solvent, independently of his real estate. I need not say, that it was after his death that Sir *John Romilly's* Act became law.

Mr. *Leopard*, also, has been dead more than twenty-five years, and he too died solvent.

Mr. *Harry Cook* was made a bankrupt in 1826, and obtained his certificate before *April* 1828. His estate has paid dividends, I believe, amounting to some shillings in the pound. He was the executor, the sole acting executor, of Captain *William Bolton*—had proved his

his will in the proper Ecclesiastical Court, in that character, before the year 1820, and had, as his executor, previously to the bankruptcy, possessed personal estate of Captain *William Bolton*, more than sufficient to pay his funeral and testamentary expenses and all his debts, including the amount which at his decease he owed, or for which he was then accountable, to the estate of his intestate, Mr. *David Bolton*. And if Mr. *Cook* had done his duty as executor, all accounts and claims between the estate of Captain *William Bolton* and the estate of his father would have been settled and adjusted before the bankruptcy, nor would there have been any ground or pretence for either of the bills before us.

1852.

 BOLTON
 v.
 POWELL.

Various administrators *de bonis non*, of the effects of Mr. *David Bolton*, have from time to time, since Captain *William Bolton's* death, been appointed. The first of these, namely, his sister, Miss *Louisa Bolton*, became administratrix in *August* 1818, and continued in that capacity to her death. She died in or shortly before the year 1825, leaving Mr. *Harry Cook* her executor. She was succeeded in the office of administrator in 1825, by her brother, *David Bolton* the younger, who died in or before *January* 1827, leaving Mr. *Harry Cook*, who was one of the sureties for him as administrator, his executor also. Upon the death of *David Bolton* the younger, his sister *Anne Maria Bolton* became, in *January* 1827, her father's administratrix. She died in or before the year 1829. But previously to her death, there had been by herself, or her predecessor, *David Bolton* the younger, effected, as it seems, a compromise or composition with the bulk of the creditors of her intestate. She was succeeded as administratrix by her sister, *Charlotte Bolton*, in the summer of 1829.

It

1852.
 BOLTON
 v.
 POWELL.


It was this lady who, in her character of administratrix, and also as one of the next of kin of the intestate, *David Bolton*, her father, filed, in *December* 1832; the earlier of the two bills now before the Court. The suit so begun was brought, or attempted to be brought, to a hearing in 1836, when it came on before Lord *Langdale*, then Master of the Rolls; but the Defendants in it, or some of them, took an objection for want of parties, to which the learned Judge acceded, giving leave to amend. The hearing, therefore, was ineffectual, or none. The bill having been amended in the same year, new Defendants were added, who, (and among them Mr. and Mrs. *Howard*,) answered it in 1837.

But in 1838 *Charlotte Bolton* married Mr. *Raphael Romanel*. It is not in evidence whether she became his widow, or whether he is living or dead. She, however, died in the year 1847. Between Lord *Langdale's* order of 1836 and her decease, not a step of any kind was, I believe, taken in the cause, except as I have said, and except that an order was made upon a motion as of course, in the year 1839.

I see no reason, however, to believe that Mrs. *Romanel* or her husband authorized the obtaining of this order, which must have been irregular, and substantially good for nothing. It seems also, that in 1840 an irregular and ineffectual attempt was made to bring on the cause again for hearing, but this useless and fruitless step also I do not infer to have been authorized by Mrs. *Romanel* or her husband.

The second bill before us was filed in *October* 1848, by Mr. *Howard* (who had been a bankrupt), and his wife suing as a co-plaintiff by a next friend. It was in the latter part of that year that Mrs. *Howard*, the present

sent administratrix *de bonis non* of the intestate *David Bolton*, became so in succession to Mrs. *Romanel*. The letters of administration granted to Mrs. *Howard* have in the margin the words "sworn under 100*l.*," and accordingly appear to be stamped with a 20*s.* stamp only. This lady, who is a child of a son of the intestate, whom the intestate survived, became consequently, upon his death, entitled to share in the distribution of his property accordingly, and now, under certain instruments, has, or claims to have, acquired a title for her separate use to the whole of his personal estate unadministered, except some small portion which (including Captain *William Bolton's* share) does not, I think, exceed 3-18ths of it. And I may here observe, that among the parts of this property so claimed by her, are the distributive shares of *Charlotte Bolton* in her own and some other rights; the title of Mrs. *Howard* to which is so stated as that, according to the bill of 1848, when that of 1832 was filed, *Charlotte Bolton* had ceased to have any beneficial interest in her father's personal estate, although, as I have said, she professed to sue not merely as his administratrix, but also as one of his next of kin, concealing, or at least not disclosing, the assignment that she had made to Mrs. *Howard*,—made, unless I mistake, for a consideration so small, as to be scarcely or but little more than nominal. Nor, indeed, do I collect that Mrs. *Howard* paid a price indicative of much value for any share that she purchased. This, however, may not be material. I do not understand that there is a personal representative of *Charlotte Bolton* before the Court,—certainly her husband, who may be living or may be dead, is not a party to the litigation.

1852.

 BOLTON
 v.
 POWELL.

I have now to mention two earlier suits in this Court, both, however, instituted after Captain *William Bolton's* death: a cause of *Bolton v. Cook*, and a cause of *Smith v. Cook*:

1852.
 BOLTON
 v.
 POWELL.

Cook:—in neither of which, however, was Mr. *Leopard*, or his estate real or personal, or the real estate of Captain *William Bolton*, sought to be charged or a party or represented. The object of the suit of *Bolton v. Cook*, (among the Plaintiffs in which were *Louisa Bolton*, *David Bolton* the younger, *Anne Maria Bolton*, and *Charlotte Bolton*, and among the Defendants to which were Mrs. *Howard*, then Mrs. *Wallis*, and Mr. *Cook*,) was to take and settle the accounts between the intestate and Captain *William Bolton*, and of Captain *William Bolton* as administrator, and to administer the personal estate of the intestate for his creditors and next of kin. The suit of *Smith v. Cook* was a creditor's suit, a suit on behalf of the creditors of Captain *William Bolton*, to have his personal estate administered. A decree in *Bolton v. Cook*, according to the object of the bill, was made in 1819.

The decree in *Smith v. Cook* (which, with or without the other decree, had, it must be remembered, probably the effect of protecting *Harry Cook* from any other suit, by any person having a demand on him as the executor of Captain *William Bolton*), was made in 1820, though under neither of the two decrees, as I believe, was there any report before *Harry Cook's* bankruptcy. But, in my opinion, there does not appear any good or sufficient reason why general reports under both decrees were not obtained as early as the year 1823, or earlier, or why the Plaintiffs in *Bolton v. Cook* did not, before Mr. *Cook's* bankruptcy, place him in a position in which he might have been compelled to pay at least into court the whole sum due from Captain *William Bolton* at his death, or for which he was then accountable to the personal estate of the intestate, especially as *Harry Cook's* examinations in the two causes (which probably might and ought to have been obtained in or before 1823) were

were in *August* 1825 obtained and brought in ; and it is in my judgment a reasonable and just inference from the materials before us (supposing them incapable of being properly and usefully added to), that it has been by means of the negligence—the wilful negligence and laches of *Louisa Bolton*, *David Bolton* the younger, and *Charlotte Bolton*, or of the Plaintiffs in *Bolton v. Cook*, that this sum has not been wholly recovered from the proper source, namely, the personal estate of Captain *William Bolton* ; nor am I sure that on the same point *Mrs. Howard* is exempt from the same charge. I think that probably she is not.

I may notice distinctly, that there appears no reason to believe that before 1826 Mr. *Cook* was otherwise than in a state of credit, and actual, or at least apparent, solvency, a subject upon which Mr. *Hoghton's* testimony may be referred to.

It may be next as well to consider whether it is a just inference from the facts in evidence, that Captain *William Bolton* in his lifetime committed any breach of trust, or failed in his duty to the estate of his intestate. I am not, I acknowledge, satisfied as to this. It is or may be true that at Captain *William Bolton's* death he was considerably indebted to that estate, or accountable for a considerable sum to it, and that the demands of the creditors and next of kin of the intestate were then far from being fully satisfied ; but the existence of just and sufficient reasons for that state of things seems not impossible, and in a suit not commenced before *December* 1832, if before *October* 1848, nor brought to an effectual hearing before the year 1851, it may be that those just and sufficient reasons ought to be presumed to have existed, in the absence of evidence to the contrary. It may perhaps be thought that evidence to the contrary

1852.
 Bolton
 v.
 Powell.


1852.
BOLTON
v.
POWELL.

contrary is absent. It is observable too, that there is neither proof nor likelihood that any citation or proceeding issued or took place for compelling Captain *William Bolton* to exhibit an inventory, nor does he appear to have been in his lifetime cited in any manner, or sued in any way, or to have refused to account. It needs not be said that his executor at no time represented the intestate, or that an administrator cannot choose his successor.

And now a word more with regard to the manner in which the litigation before the Court has been conducted. I have noticed that more than eight years elapsed between the marriage and the death of *Charlotte Bolton*, an interval of total inaction with respect to her suit, subject only to the possible exception of those irregular and useless proceedings during that time, as to which I have stated my opinion to be, that neither she nor her husband authorized either of them. But those proceedings, such as they were, took place before the year 1841, whereas her death happened, as I have said, not until some time in 1847. Now, what is the legitimate effect, if any, of this inaction, or what the proper inference from it? How ought it to be treated? A question not to be answered without remembering that the husband of an administratrix is substantially and in effect during the marriage the administrator: she cannot act, during the marriage, in that capacity. The power, and right, and duty, of doing so are, while he is her husband, in him,—though I do not certainly know that it is part of the duty, if it is within the competency, of an administrator *de bonis non*, under any circumstances, to sue in equity upon an administration bond given when a predecessor in the office, whom he has not immediately succeeded, became administrator.

Charlotte

Charlotte Bolton was a Plaintiff without any beneficial interest in the subject of her suit; whether a spinster, a married woman, or a widow, there was nothing for her to gain or lose by its success or failure, except, possibly, the costs of it. But I do not see how this helps Mr. or Mrs. *Howard*. For none of the Defendants who represent respectively the personal assets of Mr. *Leopard*, and the real assets of Captain *William Bolton*, can be taken to have colluded with *Charlotte Bolton* or her husband. The fact, if true, that Mrs. *Howard* had a beneficial interest in the prosecution of the bill of 1832, seems rather unfavourable than favourable to her, as to the manner of viewing the period of inaction to which I have been referring.

1852.

 BOLTON
 v.
 POWELL.

Again, I do not see that she or Mr. *Howard* can derive any benefit from the consideration (sometimes, possibly, in cases of delayed revivor material), that where a woman who is a sole Plaintiff marries, it is generally, or always, competent to a Defendant to move that the suit may be revived within a certain time, or be dismissed; but it is not incumbent on a Defendant to do so.

Upon the whole, it is, I conceive, a just inference from the documents and facts before us, that whether between the order of 1836 and Mrs. *Romanel's* marriage, she intended or did not intend to abandon, did or did not abandon, her suit—neither she nor her husband did after her marriage either wish or intend that it should be prosecuted. My opinion is, that they must, upon the evidence, be taken to have intended to relinquish and abandon, and in fact to have relinquished and abandoned, the suit, which in my judgment, notwithstanding her coverture, it was competent to them or him to do. He, as I have said, was during the marriage the effective administrator, and if his wife was a trustee

1852.
 BOLTON
 v.
 POWELL.

trustee the effective trustee in her place, with as absolute power over the cause, except that it was abated, as if he had been sole Plaintiff in his own right.

It appears, therefore, to me that the present Plaintiffs are not entitled to resort or take to the bill of 1832, and that the litigation before us ought for every purpose of relief to be treated as having commenced with the filing of the bill of *October* 1848,—more, therefore, than a quarter of a century after Captain *William Bolton's* death,—more than a quarter of a century after probate of his will,—more than twenty years after *Louisa Bolton* had become administratrix in his place,—more than twenty years after the death of Mr. *Leopard*, who died in 1823,—and more than twenty years after Mr. *Cook* had obtained his certificate under his bankruptcy.

This is a view of the case which (if necessary to be put in issue) has, I conceive, been sufficiently put in issue by one at least of the answers, and is (if correct) fatal to the bill of 1848, rendering it, as I conceive, not improper for me to abstain, as I do, from intimating any opinion upon some other questions of an important description, or that might have been so.

One—whether upon the assumption that neither Mrs. *Romanel* nor her husband abandoned, or intended to abandon, the suit commenced in 1832, Mr. and Mrs. *Earle* are entitled to the benefit of a statutory bar against the bill of 1848; and if they are, whether that does not also discharge Mr. *Leopard's* representatives.

Another, whether (though I have assumed and stated what I have respecting the accounts and debt between Captain *William Bolton* and the estate of his intestate at
 the

the time of Captain *William Bolton's* death) those who represent his real assets and the assets of Mr. *Leopard* are not entitled effectually to say that, as against them, there is no proof to what amount, or whether to any amount at all, Captain *William Bolton* was at his death indebted to his intestate's estate.

1852.
BOLTON
v.
POWELL.

Another, whether, even if Captain *William Bolton* was then largely indebted to that estate, any breach of the condition of the bond has been committed beyond the mere omission to exhibit an inventory; and, if not, whether a court of equity ought to interfere upon such a breach.

Another, whether the conduct of *Louisa Bolton* and *David Bolton* the younger, alone or together with the other original Plaintiffs in the suit of *Bolton v. Cook*, had at or previously to the bankruptcy of *Harry Cook* been such as in effect to discharge the assets of Mr. *Leopard*, and the real assets of Captain *William Bolton* from the bond.

Another, whether the fact, that *Charlotte Bolton*, when she filed her bill, professing by it to have a beneficial interest as one of the intestate's next of kin, had in truth no such interest, (inasmuch as she had previously sold and assigned such beneficial interest as, in her own right and otherwise, she had acquired in his personal estate) ought, or ought not to be considered of itself fatal to that bill.

Another, whether *Charlotte Bolton's* suit was one in its nature, which, at least, before decree, it was competent to Mr. and Mrs. *Howard* or either of them to revive or continue: A question capable, perhaps in the particular

1852.
 BOLTON
 v.
 POWELL.

particular circumstances of this case, of being put without disputing, that it is a general rule, that where a person files a bill in equity as an administrator *de bonis non*, and dies before obtaining a decree, his successor in that office may revive and continue the cause.


And still another, whether, after the deaths of the obligee and two of the obligors in an administration bond, the bankruptcy of the third, and his certificate obtained under it, (that third being one of the sureties,) a suit in equity without a previous action can (where the administrator died in 1817) be maintained upon the bond against those representing him as to his real estate, and against the personal representatives of the deceased surety in the name of a subsequent administrator (an administrator *de bonis non*, being also one of the intestate's next of kin), as the sole Plaintiff, making the ordinary's personal representative one of the Defendants, where neither the ordinary nor his personal representative has refused or been asked to sue, or declined or been asked to lend his name, or acted collusively or unfairly, but the Ecclesiastical Court has substantially sanctioned the suit by allowing the bond to be produced and proved in it.

It follows from what I have said, that, the present Master of the Rolls having dismissed the two bills before us, I am against disturbing that dismissal. And as I think one (if not both) of the bills totally wrong in every sense,—as I think each of them a proceeding for a harsh and stale demand, and entitled to no favour, and as I consider one, if not each of them, a litigious speculation, I must declare my opinion to be, that the costs already given should remain as they are, and that the appeal failing should fail with costs.

The

The LORD JUSTICE LORD CRANWORTH.

I concur with my learned Brother in thinking, that the decree of the Master of the Rolls, dismissing this bill, or rather these bills, with costs, ought to be affirmed.

1852.

 BOLTON
 v.
 POWELL.

The material facts of this case have been so fully stated in the judgment just delivered, that I do not feel called upon to advert to them at any length. It will be sufficient for me, in order to explain the grounds on which my opinion rests, to remark, that the decretal order on further directions, in the cause of *Bolton v. Cook*, was made in *March* 1832. At that time, it must have become apparent to all parties interested in the assets of *David Bolton*, the intestate, that there was no real prospect of their obtaining anything, unless the administration bond could be made available for the purpose. Proceedings on such bonds are of comparatively rare occurrence; therefore, it cannot be matter of surprise if the next of kin of *David Bolton* were unwilling to embark in a course of litigation, in which there was little authority to guide them, and in which success would necessarily be very doubtful. That this was the case is manifest.

David Bolton, the intestate, left at his death seven children, besides four grandchildren, children of a deceased daughter, and two grandchildren, children of a deceased son. His residuary personal estate was therefore divisible into nine equal parts; each of his seven children would be entitled to a ninth, the four children of his deceased daughter to another ninth, and the two children of his deceased son to the remaining ninth.


The present Plaintiff, Mrs. *Howard*, is one of those two children; and, at the date of the decretal order of

1852.
 BOLTON
 v.
 POWELL.

March 1832, she had ceased to be under the disability of coverture, though she had previously been the wife of *Thomas Wallis*. She is described in the Master's general report, in the cause of *Bolton v. Cook*, made in *July* 1831, as *Charlotte Augusta Amelia Wallis*, now *Bolton*; and was at the date of the decretal order absolutely entitled in her own right to half of one-ninth, *i. e.* to one-eighteenth of the residuary personal estate of the intestate, her grandfather. It appears that, between the date of that decretal order and the middle of the following month of *July*, she purchased up seven-ninths of that residue, *i. e.* the one-ninth share of the four children of the intestate's daughter, who had died in his lifetime, and the shares of all the seven children of the intestate living at his death, except that of *William Bolton*, the original administrator, and who was of course the party primarily liable on the administration bond. These shares were all either assigned, or agreed to be assigned to her, by instruments executed on various days, the earliest dated on the 11th *April* 1832, and the last on the 14th of *July* 1832; and she thus became entitled to the whole residue, except the ninth of *William Bolton*, and the half of another ninth then vested in Mr. *Roberts*, the husband of her late sister.

One of the ninth shares thus purchased by her, was that of *Charlotte Bolton*, a daughter of the intestate, and at that time his administratrix *de bonis non*. She assigned her share to the now Plaintiff, Mrs. *Howard*, then *Charlotte Augusta Amelia Bolton*, by deed, which contained the ordinary powers enabling the now Plaintiff, Mrs. *Howard*, then *Charlotte Augusta Amelia Bolton*, to use the name of the said *Charlotte Bolton* in any suit, for recovering the share so assigned. The deed containing this power was dated on the 13th of *July* 1832, and in the following month of *December*, the first
of

of the bills now before us was filed in the name of *Charlotte Bolton*, against the real representatives of *William Bolton* and the personal representatives of *Leopard*, the solvent surety, and other necessary parties, seeking to make them liable under the administration bond.

1852.

 BOLTON
 v.
 POWELL.

The ordinary mode of proceeding on an administration bond is, first to obtain the permission of the Ecclesiastical Court, that the bond shall be attended with. And all the authorities concur in shewing that, without this permission, the temporal courts cannot, or at all events will not, act on or recognise the bond as an existing instrument.

When the Ecclesiastical Court has sanctioned the production of the bond, then the ordinary course is, for the creditor or next of kin, as the case may be, to bring an action on the bond, in the name of the Archbishop or his representative, against the obligors. Supposing such a proceeding to have been instituted, and effectually prosecuted, whether by a creditor or next of kin, this Court will certainly find the means of compelling the application of whatever may have been so recovered in a due course of administration. This was done by Lord Chancellor *Hardwick*, in the case of *Greenside v. Benson (a)*.

In the present case, the proceeding adopted in 1832 for enforcing the bond was not an action in the name of the representative of the Archbishop, but a bill in this Court, at the instance of *Charlotte Bolton*, as administratrix *de bonis non*, and also as one of the next of kin of the intestate, making the representative of the Archbishop a co-Defendant with the representatives of the obligors sought to be charged by virtue of the bond.

It


(a) 3 *Atk.* 248.

1852.
 {
 BOLTON
 v.
 POWELL.

It was contended for the Defendants, that this course could not be permitted in a case like the present, where there is no proof of collusion, and where it is not proved that the obligee had refused to permit his name to be used as Plaintiff in an action at law. The Plaintiff answered this objection by saying, that here the two obligors sought to be charged were dead, *Cook*, the surviving obligor, being bankrupt and insolvent. This, it was contended, would well warrant a proceeding by the obligee, *i.e.* the representative of the Archbishop, by way of bill in this Court, seeking to charge the assets of the deceased obligors, instead of an action at law: and it was said, further, that in such a suit the administratrix *de bonis non* must of necessity be a party, and that it could make no real difference whether she was made a Defendant or a Plaintiff. There is no authority for such a bill, or, at all events, none was produced at the hearing, nor have I been able to discover any in the books. But I will for the present assume that the view of the law thus taken by the Plaintiffs is correct, and that the suit instituted in *December* 1832 was properly framed, and that, if duly prosecuted, the relief sought by it might have been obtained.

The bill, however, then filed is not, it must be observed, the bill on which relief is now sought. The bill, the right to relief under which is now immediately in question, is that filed in *October* 1848. If that is to be dealt with as an original bill, the Plaintiff would clearly be deprived of all title to relief by lapse of time. The proceeding in this Court, assuming it to be well instituted, can only be a substitute for an action at law on the bond; and when the legal right of action is gone, all right here is gone with it. Now, if an action had been brought in *October* 1848, against the representatives of the obligors, they would clearly have had a
 good

good plea in bar, by virtue of the 3 & 4 *Will.* 4, c. 42, s. 3; and so, if the Plaintiff's proceedings here are to be treated as commencing in 1848, they must be considered as barred by the same clause in the statute.

1852.

 BOLTON
 v.
 POWELL.

In order to get out of this difficulty, the bill of 1848 is framed as a bill of revivor or supplement, or of revivor and supplement of and to the former bill of 1832; and if the present Plaintiffs were entitled so to treat it, then possibly it might follow that, as there was no statutable bar in 1832, so neither was there in 1848. But I have come to the conclusion that the bill of 1848, at all events so far as relates to the statute, cannot be treated by the present Plaintiffs either as a bill of revivor or supplement of or to the former bill, but that it must be regarded as an original bill, and so that all right to relief under it is gone by lapse of time.

The grounds on which I come to this conclusion are shortly as follows :—

The bill of 1832 purports to be filed by *Charlotte Bolton* in two characters: first, as administratrix *de bonis non* of the intestate, *David Bolton*; and secondly, as one of his next of kin. But she had certainly no right to sue in the latter character; for she had several months before the institution of the suit, sold and assigned to the present Plaintiff, Mrs. *Howard*, all her interest as one of the next of kin, and had therefore no interest in that right entitling her to ask for relief,—at all events, no right to be sole Plaintiff in a suit framed like that of 1832, which makes no mention of the fact that she had parted with all her right as next of kin.

The bill of 1832 must therefore be treated as a bill filed by her in her character of administratrix *de bonis non*.

1852.
 BOLTON
 v.
 POWELL.

non. Now, supposing her to have been capable of instituting the suit in 1832 in that character, yet it is obvious that her right so to proceed depended on principles altogether different from those which generally enable persons filling that character to sue either here or at law. Where a bill is filed by an administrator or an administratrix *de bonis non*, it can generally only be sustained because the Plaintiff is asserting a right which the intestate, if living, might have asserted; or, at all events, a right which she possesses by reason of her representing the intestate.

In such a case, no one but the administrator can in general sustain the suit; and the most obvious principles of justice require that his death shall not defeat the rights of persons interested in the suit which he has commenced; and therefore the proceedings so instituted (I assume that they were instituted properly, and in due time) may be continued by a succeeding administrator *de bonis non*, and the suit will proceed, as to its practical result, as if the original Plaintiff was still alive. Whether the bill by which this is to be effected is technically to be described as a bill of revivor or a bill of supplement and revivor, or an original bill in nature of a bill of revivor, is a point on which I do not stop to inquire. The object certainly may be attained by a bill properly framed for the purpose. But it cannot escape observation that *Charlotte Bolton* was not, by the bill of 1832, asserting any right which could have been asserted by the intestate, nor any right which she possessed as representing the intestate.

The rights of creditors and next of kin under the bond are rights which they enjoy under a title collateral to that which they possess from or under the intestate. They are, in substance (when the Ecclesiastical Court has

has ordered the bond to be attended with), *cestuis que trustent* of the money secured by the bond.

1852.
Bolton
v.
Powell.

In any suit instituted in this Court, for enforcing against the assets of deceased obligors the payment of that money, the administratrix *de bonis non* must probably be a party; for whatever may be recovered must be administered as if it had formed part of the assets of the intestate. Perhaps, therefore, she has an interest which enables her to be Plaintiff in such a suit, though I own I think that doubtful. I am not satisfied that, after a breach of the condition of the bond by misapplication of the assets, payment by the sureties to the administratrix *de bonis non* would of itself and alone discharge their liability. At all events, the right of the administratrix *de bonis* to be Plaintiff, if she has such a right, is not a right which she possesses to the exclusion of the creditors or next of kin, any of whom may be Plaintiff or Plaintiffs in such a suit, as, being equitably entitled to the money due on the bond; supposing always that any one can be Plaintiff, other than the obligee or his representative. The right to institute such a suit in this Court, supposing such right to exist, must depend on the same principles as those on which parties are permitted to sue at law, in the name of the Archbishop, namely, that they are substantially the *cestuis que trustent* of the bond; and therefore admitting, for the sake of argument, that description to be applicable to an administratrix *de bonis non*, it certainly still more clearly applies to the next of kin, who, on the older authorities, seem to have been considered as the only parties entitled to the benefit of the bond. It follows, therefore, that, even after the institution of the suit in *December* 1832, the present Plaintiff, Mrs. *Howard*, then under no disability whatever, might have filed a bill against the representatives of the deceased obligors, seeking

1852.
BOLTON
v.
POWELL.

seeking precisely the same relief as that which she is now asking.

The pendency of the suit of 1832 would present no impediment until a decree had been obtained. Nor was her position varied by the fact of her marriage with Mr. *Howard* in *December* 1833; for it appears that by articles made previously to her marriage, it was agreed that all her personal estate should be settled to her separate use, so that she retained the exclusive interest in whatever might be recovered by virtue of the bond.

Such then being her position, having, as she had all along, from the date of the decretal order in 1832, the same right to institute a suit for enforcing, against the representatives of the obligors, their liabilities on the bond, which she had in 1848, can it make any difference that, before she filed the present bill, she clothed herself with the character of administratrix *de bonis non*? I think not. If it was necessary, as probably it was, that an administratrix *de bonis non* should be a party to the suit, it certainly was not necessary she should be a Plaintiff; she might have been made a Defendant in a suit instituted by any creditor or next of kin. In the ordinary case of a bill by one administratrix, the right of a succeeding administratrix to prosecute the suit by bill of revivor, is or may be essential to the ends of justice, but no such necessity exists in a case like the present; where, even if she can maintain the suit at all, she does so, not by reason of a title peculiar to herself, but of a right which she possesses concurrently with the creditors and next of kin, whose right to sue is at least as clear as hers.

The relief which the Plaintiffs now ask is the same
which

which they might have obtained if they had, during the life of *Charlotte Bolton*, afterwards *Charlotte Romanel*, and before the right of action on the bond was gone, filed a bill making Mr. and Mrs. *Romanel* Defendants, and asking precisely what they now ask. The right to file such a bill having ceased by lapse of time long before the bill of 1848 was filed, could not in my opinion be revived by the circumstance that Mrs. *Howard* had in 1848 clothed herself with a new character, not essential to enable her to file a bill.

1852.

 BOLTON
 v.
 POWELL.

On the short ground, therefore, that the bill of 1848 cannot be connected with that of 1832, but must be treated as a bill seeking original relief, I concur with my learned Brother in thinking that both bills were properly dismissed with costs by the Master of the Rolls; and I further think that this appeal ought not to have been made, and so that it must be dismissed with costs.



1852.

1851.

Dec. 10, 19,
20, 22.

1852.

March 19, 20.

Before *The*
LORDS JUSTICES.

At the hearing of a suit to establish a will, an issue was directed at the instance of the heiress at law, who was a married woman. Before any trial she and her husband presented a petition, stating that at the urgent request of their children (who were devisees), they had agreed to withdraw all opposition to

the will, upon being allowed their costs, and praying that the order directing the issue might be discharged upon these terms. Upon this petition, an order was made according to the prayer, and purporting to be made upon the consent of the married woman by her counsel. Subsequently a private Act of Parliament was obtained authorizing leases to be made of the devised estates. The married woman was one of the petitioners for the Act, and was excepted from the saving clause, and the Act recited the will, and proceeded upon the assumption of its validity. Some years afterwards the married woman presented a petition to rehear the cause. This petition was entitled in the cause and in the matter of the private Act. It stated the subsequent transactions, but not the provisions of the Act.

Held, that the preceding transactions did not constitute grounds for taking the petition off the file, and that such grounds were not afforded by the introduction into the petition of statements as to the matters occurring since the hearing, or by the petition being entitled in the matter of the Act, or by the omission to set out in it the Act itself, especially upon appeal, when these objections of form had not been insisted upon in the Court below.

Held also, upon the rehearing, that the order discharging the direction for an issue was not binding upon the wife, but was upon the husband.

Semble, per Lord Cranworth, that if at the hearing a married heiress at law does not ask for an issue, she is bound by the decree.


TURNER v. TURNER.

THIS was an appeal from an order of the Master of the Rolls, acceding to a motion on the part of the Plaintiff, to take off the file a petition of rehearing, presented by *Mary* the wife of *William S. Meryweather*, who were two of the Defendants.

The bill was filed on the 3rd of *October* 1829, by the infant children of the Petitioner Mrs. *Meryweather*, seeking to establish the will of their grandfather, Mr. *William Turner*, whose heiress at law and customary heiress Mrs. *Meryweather* was. By the will freehold and copyhold estates were devised upon certain trusts under which the infant Plaintiffs were interested.

Mrs. *Meryweather* and her husband joined in their answer, and thereby admitted the due execution of the will. They had received a legacy of 500*l.*, bequeathed by the will to Mrs. *Meryweather*, and presented a petition in

in the cause for payment to them of an annuity of 500*l.* per annum, also given to her by the will.


1852.

 TURNER
 v.
 TURNER.

On the 25th of *January* 1832, the cause came on for hearing, when upon the application of Mrs. *Meryweather*, an issue *devisavit vel non* was directed, the adult Plaintiffs being directed to be Plaintiffs at law.

On the 27th of *November* 1832, an order was made substituting the trustees of the will as Plaintiffs in the issue. From this order of substitution Mr. and Mrs. *Meryweather* had unsuccessfully appealed.

On the 5th of *February* 1833, no trial of the issue having taken place, Mr. and Mrs. *Meryweather* presented a petition in the cause to have the order for it discharged. This petition contained the following allegations :—

That the testator was, at the time of the execution of his will and codicil, under the influence of persons hostile to Mr. and Mrs. *Meryweather*, who, taking advantage of his impaired state of mind, compelled him to make such will and codicil. That the Petitioners had been guided throughout the before-mentioned proceedings in opposing the said will and codicil, from a deep sense of injury, and from the conviction of the necessity for them to clear their characters from the imputations conveyed by the will and codicil, more particularly as the said testator had therein directed that the guardianship of the Petitioner's children should be removed from them ; that the Petitioner's said children had always lived with them on terms of the greatest affection. That the testator had directed the payment of the said annuity of 500*l.* to Mrs. *Meryweather*, in a way degrading to the feelings of herself and her husband ; but that the Petitioners had, at the
 urgent


1852.

 TURNER
 v.
 TURNER.

urgent request of the three adult children who were Plaintiffs, consented and agreed to withdraw all further opposition to the will, the adult children being willing and desirous that the expenses incurred up to that time by the Petitioners in preparing for the trial, should be allowed to the Petitioners as costs in the cause. The prayer was, that the order of the 25th of *January* 1832, directing the issue, and that of the 27th of *November* 1832, substituting the trustees as Plaintiffs, might be discharged; and that the costs of and relating to the issue, and of the said application and consequent thereupon, might be costs in the cause as between solicitor and client, the Petitioners thereby undertaking to admit the validity of the will and codicil of the said testator, and submitting to have the trusts thereof performed and carried into effect under the direction of the Court.

This petition came on for hearing, together with the cause, upon further directions, on the 14th of *February* 1833, when a decree was made in the cause and on the petition, which after stating that the Defendant *Mary Anne Meryweather* the heiress-at-law, and customary heiress of the said testator, by counsel consented that the orders of the 25th day of *January*, and the 27th day of *November* 1832, should be discharged, ordered those orders to be discharged accordingly. It further declared, that the will and codicil were well proved, and it ordered that they should be established, and the trusts thereof be performed and carried into execution. The costs were directed to be taxed, and to be paid in the manner as sought by the petition.

In 1845, a petition was presented to Parliament for a private Act authorizing building leases to be made of part of the land devised, and was signed by (among others) Mr. and Mrs. *Meryweather*. An Act for that purpose

purpose passed accordingly, and the rights of Mrs. *Meryweather* and her heirs were excluded from the saving clause.

1852.

 TURNER
 v.
 TURNER.

On the 13th of *January* 1851, Mrs. *Meryweather* obtained upon motion before the late Master of the Rolls, an order giving her leave to present by her next friend a petition of rehearing of the decree of the 14th of *February* 1833, and afterwards presented a petition of rehearing, intituled in the matter of the private Act as well as in the cause, but not stating the Act in the body of the petition.

On the 29th of *May* 1833, the trustees moved before the present Master of the Rolls, to discharge the order of the 13th of *January* 1851, and that the petition of rehearing might be taken off the file. His Honor thereupon ordered that the petition should be taken off the file. From that order Mrs. *Meryweather* now moved, by way of appeal.

On this day the motion was placed in the paper, but the Appellant did not appear in person or by counsel. December 10.

Mr. *Rolt* appeared for some of the Respondents.

Their LORDSHIPS, after consulting the Registrar, said, that in the case of an appeal motion, it was not now the practice to require an affidavit of service in case of the non-appearance of the Appellant, but that the course was to treat the application as an abandoned motion, and not to strike it out or place it at the bottom of the paper. There was no ancient practice applicable to such a case, the practice of placing motions in the paper being of modern date.

Afterwards the absence of counsel having been accounted

1852.
 {
 TURNER
 v.
 TURNER.
 —
 Dec. 19, 20,
 22.

counted for by severe and sudden illness, the motion was again ordered to be placed in the paper.

Mr. *Bethell* and Mr. *Villiers* for the Appellant.

Mr. *Roundell Palmer*, Mr. *Wright*, and Mr. *Hardy* for the trustees.

A decree made by consent cannot be made the subject of a petition of rehearing on the application of a party to the consent. Nor is the consent in such a case of a married woman, if taken by the Court, in a different position from any other consent. Consents on behalf of infants have been held to be binding, *Wall v. Bushby* (a), *Burke v. Crosbie* (b). This petition is also irregular in point of form. It ought not to have been intituled in the matter of the Act of Parliament authorizing the granting of the leases, and it should have stated that Act in the body of the petition. The passing of the Act was a matter occurring subsequently to the order and ought to have been brought to the attention of the Court. *Wood v. Griffith* (c).

[*The LORD JUSTICE KNIGHT BRUCE*.—Did you take these points before the Master of the Rolls?]

No. The case was there argued entirely on the merits. Suppose the wife had never disputed the will—had never asked for an issue—would it not have been of course to establish the will? Is not this the same thing? She never asked for an issue except by her husband. In the same manner she waived it.

[*The*

(a) 1 *Bro. C. C.* 487; and *Mood.* 245.
 see *Tillotson v. Seagrave*, 3 (b) 1 *B. & B.* 502.
Mood. 494; *Levy v. Levy*, 3 (c) 19 *Ves.* 550.

[*The* LORD JUSTICE KNIGHT BRUCE.—Can such a question be decided upon an application to take the petition off the file?]

1852.
TURNER
v.
TURNER.

Independently of these objections the petition seeks to affect the rights arising under the Act of Parliament, for which Mrs. *Meryweather* was one of the Petitioners, and which confirms the will and binds Mrs. *Meryweather* by excluding her from the saving clause. If a party seeking a rehearing has done anything since the original hearing, affecting his right to question the decree, that circumstance must be brought before the Court to enable the Court to decide as to the effect of it: *Wood v. Griffith* (a).

[*The* LORD JUSTICE LORD CRANWORTH.—But can a married woman do any such act?]

Yes ; she may be party to an Act of Parliament which will bind her. The 17th section of this Act provides for the enfranchisement of copyholds, and the latter part of that section renders it clear that the copyholds must go according to the will. The proper application in such a case is to have the petition taken off the file. *Cunningham v. Cunningham* (b), *Gwynne v. Edwards* (c), *Davenport v. Stafford* (d), *Hargrave v. Hargrave* (e).

Mr. *Rolt* and Mr. *J. V. Prior*, for other Respondents.

What a Court has decided can alone be the subject of appeal. Anything else that is found in a decree is not capable

(a) 19 *Ves.* 551 ; 1 *Mer.* 35.

(b) *Ambl.* 89.

(c) 9 *Beav.* 22.

(d) 8 *Beav.* 503.

(e) 8 *Beav.* 289.

1852.
 TURNER
 v.
 TURNER.

capable of being reheard. Whether a married woman has waived an issue or declined to ask for it is the same thing, and is not a matter for a rehearing. If she could show that by fraud she had been induced to exercise her option prejudicially, that would be the subject of a different proceeding, but not of a petition of rehearing. The circumstance of the petitioner being a married woman is not sufficient ground for a rehearing; for if she is not bound by her husband having declined an issue, she would not be bound by the result. Suppose the issue had been tried, and her husband omitted to adduce evidence, could it be said that she was entitled to have a fresh issue directed? A married woman is, as long as she elects to be defended by her husband, as much bound by the proceedings in a cause as if she had defended separately by a next friend.


[*The LORD JUSTICE KNIGHT BRUCE.*—We only desire to hear a reply upon the questions—of the title of the petition,—whether it does not state too little or too much,—and of costs.]

Mr. Bethell in reply.

As to the title of the petition, mere superfluity of title will not prejudice the right to relief. As to the petition stating too little, with reference to the authority of *Wood v. Griffith* (a), all that was said in that case upon this subject was the following observation:—“As to the effect of the order by consent, very grave reasons are required to induce the Court to refuse the benefit of an appeal. It is difficult to say that such an order made it impossible for the Defendant to appeal, but he ought to have

(a) 19 *Ves.* 551.

have inserted the order in the petition." It is nowhere laid down that the omission to insert the order in the petition was the ground for taking it off the file. Lord *Eldon* expressly states the ground on which this was done, and which was that the petition proceeded upon a case different from that on which the decree was founded, and introduced circumstances not before the Court at the time of making the decree. The petition there introduced matter which was not upon the record, and stated a long series of facts which were not in evidence, and were wholly independent of the proceedings in the cause.


1852.

 TURNER
 v.
 TURNER.

[*The LORD JUSTICE KNIGHT BRUCE.*—A question occurred to me, whether the direction for an issue could have been properly discharged without a petition of rehearing. But Mr. *Monro* thinks, that although an order directing an issue is in some senses a decree, yet in others it is merely an order, and may be discharged without a rehearing.]

With regard to the objection made on account of Mrs. *Meryweather* having joined in the petition for the Act of Parliament, that Act is a mere private assurance, and the recitals do not bind beyond the enacting part.

The LORD JUSTICE KNIGHT BRUCE.

The petition for rehearing is wrongly entitled, and it would probably have been necessary or right if the objection had been taken at the Rolls to amend the petition; but the objection was not taken at the Rolls, and the case having been argued there on wholly distinct grounds, the objection may fairly be considered as having been waived. If it could not, we are not bound to give effect to it, as the Petitioner offers the Respondents the

1852.

 TURNER
 v.
 TURNER.


option of having the part objected to struck out. The question then might have arisen, whether too much was not stated upon the petition. That point, however, was also not taken at the Rolls, and, if it had been, we do not think that the principles upon which *Wood v. Griffith* was decided apply to the present case. We think that so much of the petition as may be deemed superfluous may be properly regarded upon the question of costs if the Court shall be asked to advert to it at the proper time.

Then the question arises, whether the petition states too little. That point was taken at the Rolls, but it appears to me that, considering that the title of the Act of Parliament was introduced, which gave notice of it to the Court and to the parties, nothing was substantially kept back which ought to have been stated.

These difficulties being out of the way, then comes the question whether the lady is entitled to have the materials upon which the decretal order of 1833 was made reheard, so far as she seeks to have them reheard.

It arises in this way. A bill was filed, among other purposes, to establish a will, devising freehold lands, against the heiress at law, who was a married woman. It came on for hearing, and then the only decree made, if it was a decree, was to direct an issue. An order was subsequently made, upon the application of the trustees of the will, that they should be made parties to the issue, as, I understand, together with or in the place of some children of the lady, who were parties. Before the trial, a petition was presented by the husband of the lady, in the names of himself and his wife, which is in
 some

some respects very remarkable, for, after stating the proceedings, it states.

1852.

 TURNER
 v.
 TURNER.

[His Lordship read the statement from the petition, which is set out, *supra*, p. 29.]

This amounts to an allegation of a pecuniary bargain. The petition does not state the conviction, either of the husband or of the wife, that the will was a good one; it states that they had been induced to abandon their opposition to a bad will at the request of the children, and for a pecuniary consideration, namely, the payment of certain costs, which would be a benefit to the husband only, and not to the wife. This was, in effect, a money payment to him. That petition came on with the cause, and thereupon a decree or decretal order was made, in conformity with the application, providing that the costs should be paid accordingly,—that is, that the bargain should be carried into effect. If this was not a sale of the wife's right for the husband's benefit, I do not know what is.

The decree recites that the wife consents by her counsel. It may be said that the consent of a married woman by her counsel, distinct from her husband, she having defended the suit with him and by him, and not separately, is sheer nonsense—and perhaps it is. Perhaps it is utterly without meaning; but if it has any meaning, it is wrong, because she could not so consent, according to the law of the country. Whether these words however are mere nonsense or not, they ought to be struck out of the order. They were inserted in it, I am convinced, without the knowledge of the learned Judge whose order it purports to be, his attention not having been called to them. Nor is this the first instance,


1852.
TURNER
v.
TURNER.

instance, in my experience, in which parties have drawn down mischief on themselves by altering an order according to their own fashion and views, without the knowledge of the Court.

But assuming that these words do not prejudice the order, notwithstanding that they seem to form a ground on which it purports to be made, the case still is this, that the husband abandons the right to have an issue to try the validity of the will, as to freehold estates in fee simple, of his wife's ancestor. It has been said that the husband is *dominus litis*; that he has the entire conduct of the cause, and that the wife is bound effectually and for ever by what the husband does in it. That undoubtedly is a most serious view of the case, considering the guards with which the law of this country in general surrounds a married woman as to her real estate. It is not, however, for me to deny that there may be cases in which the husband may conduct a cause so as to bind the rights of his wife as to her real estate. There may be such cases; but is this one? It is not one in which the husband has said, "I conduct this cause for myself; I feel that I have no defence, and I give it up." He says: "There is no will at all; my children, or some of them, wish me to give up the suit. I am offered certain money terms for the purpose, and therefore I give it up." What is that more or less than a sale? It is so in other words; substantially I do not observe a difference.

But whatever may be the force or value of these considerations, is this a point to be decided, not on a rehearing, not in the ordinary way in which important questions are decided by the Court, but upon an application to prevent a petition of rehearing from being heard

heard—to close the doors of the Court against the wife? There may be cases in which it is right to do so. There have been cases in which Judges of the highest authority have directed petitions of rehearing to be taken off the file. But the disputed point ought to be very clear for that purpose, and not, as I think, with great deference, one of this description, upon which there is so much room for argument.

1852.

 TURNER
 v.
 TURNER.

Without, therefore, giving any opinion whether the issue will, if directed, probably succeed, or whether an issue will be directed at all—whether there is any foundation, or a total absence of foundation for the petition of rehearing—my impression is, that everything that is to be said against it ought to be said when it shall come on, either upon the materials existing in the cause, and the petition of rehearing alone, or upon that proceeding, coupled with such other proceeding, if any, as those opposed to it may think fit to institute. The Master of the Rolls, by stopping the controversy *in limine*, has very possibly done substantially the best thing in the world for all parties concerned; still I am of opinion, with deference to him, that the matter had better be discussed at a later stage, and that the petition of rehearing may be restored to the file.

The LORD JUSTICE LORD CRANWORTH.

I am of the same opinion. I give no opinion as to what will be the result of the rehearing of the petition, either with reference to the particular facts of this case, or the general question as to how far the husband, conducting his wife's defence, has by his act bound her inheritance, which is a very important question, and upon which, I repeat, I express no opinion at all. What his Honor, the Master of the Rolls, seems to me to have done,

1852.
 TURNER
 v.
 TURNER.

done, and I think, with all respect for him, erroneously done, is, that he considered this as a point to be discussed on the preliminary question, whether the parties should be allowed to rehear or not. The authorities which, it would seem, his Honor mainly relied upon, were two or three cases before Lord *Langdale*, which, I think, proceeded on totally different principles. I allude particularly to *Davenport v. Stafford* (a), *Hargrave v. Hargrave* (b), and *Gwynne v. Edwards* (c), all which cases proceeded on this ground:—"Assume," it was said, "that the rehearing is a matter of right upon the certificate of counsel, or so much a matter of right that, *prima facie*, the right is admitted, yet a party after a decree may so conduct himself, that this Court will say, 'It is inequitable to let you present a petition of rehearing at all.'"


For instance, suppose a decree were made that gave benefit to each party, and that, after that decree was made, one of those parties, A., says to B., the other party, "Let me have no more disputes about it; I will execute a release to you of all claims whatsoever." Suppose this to have been done for valuable consideration. If afterwards the party who had given that release were to ask to have the matters reheard, the principles on which Lord *Langdale* proceeded would apply. I have put the case of a party by a release or by contract, which would be the same thing, actually debarring himself. Lord *Langdale* extends that doctrine somewhat further, but not further than principle requires and renders just. His Lordship in effect said: "If, by your conduct, you have so dealt that the parties might infer that you never meant to question that decree, you shall not afterwards be allowed to have it reheard." That was the principle on which his Lordship went in these cases: *Davenport v. Stafford* (a), *Hargrave v. Hargrave*

(a) 8 *Beav.* 503.

(b) 9 *Beav.* 22.

(c) 8 *Beav.* 289.

grave (a), and *Gwynne v. Edwards* (b), the last of which was the case of a creditor seeking to put himself in the place of the plaintiff, that plaintiff having, in the opinion of the Judge, precluded himself from having a rehearing of the case.

1852.

 TURNER
 v.
 TURNER.

Now, suppose that doctrine to be most correct—that a party may, by contract or by his conduct, prevent himself from having a right to rehear—how does that apply to the case of a married woman, who cannot contract, and therefore cannot so act as that her conduct shall amount or be equivalent to a contract? Is she to be dealt with as if she had contracted? As it is impossible for a married woman by contract to prevent herself from having the right to have her cause reheard, so, neither can she do so by her conduct. It appears to me that this distinction was not sufficiently adverted to by his Honor in dealing with this case. From the very short note handed up, it appears that his Honor relied upon the cases which I have referred to, and upon the knowledge that must have been in the mind of Mrs. *Meryweather* as to what had been done. But assume her knowledge to have been as perfect as possible—assume that she had a copy of the decree, and had released all further demands—still such a release would have been an act perfectly inoperative; and I do not think her conduct could put her in a different situation. It appears to me that the cases relied upon did not decide the question, and that Mrs. *Meryweather* is entitled to a rehearing.

Two or three other points have been made: one is, that the petition is wrongly entitled. That was a point not taken at the Rolls. If it had been, leave to amend would

(a) 9 *Beav.* 22.

(b) 8 *Beav.* 289.


1852.
 TURNER
 v.
 TURNER.

would have been probably given. Another is, that the prayer is insufficient. That, however, is open to the same answer as the other. The remaining objection was, that the petitioners had acquiesced, by what took place with respect to the leasing act. *Wood v. Griffith* (a) was also relied upon. But I think that that case does not apply. There the decree was, that the defendant should join in giving an authority for a sale. After the decree the defendant consented to an order that the Master should settle the particulars of sale; and Lord *Eldon* considered that, in presenting a petition of rehearing, the Petitioner must state enough to enable the Court to know in what position the case will be upon the rehearing; and his Lordship would not say that it might not be material to know that the applicant had consented to conditions of sale; and the petition was ordered to be taken off the file without prejudice to presenting another petition of rehearing in a more regular form. But how does that case apply to the present? Why was it material to state the circumstance of the order being made to settle the particulars of sale? Because if the decree had had to be varied upon the rehearing, the Court would have had to consider what was to be done. What is complained of here is, that the Act of Parliament is not stated. But no one questions what has been done under the Act of Parliament. All admit that what has been done under the Act must remain. It would be in vain to dispute that; therefore that ground also fails, and the Respondents are driven back to the merits of this petition, which are entirely on the side of those who seek the rehearing.

I do not say what will be the result. It may be that the consent of the wife was unnecessary to the validity
 of

(a) 15 *Ves.* 550; 1 *Mer.* 35.

of the order, in which case the words expressing such consent will be struck out of the decree. The order of the Master of the Rolls will be varied, and all costs must be reserved until after the rehearing, or till further order.

1852.

 TURNER
 v.
 TURNER.

Their Lordships intimated that to save expense they were willing themselves to hear the petition of rehearing, if all parties desired it.

On these days the petition of rehearing came on to be argued. *March 19, 20.*

Mr. *Bethell* and Mr. *Villiers*, in support of the petition.

Mr. *Roundell Palmer*, Mr. *Wright*, and Mr. *Hardy*, for the trustees.

Mr. *Rolt* and Mr. *J. V. Prior* for other Respondents.

The LORD JUSTICE KNIGHT BRUCE.

This case comes before the Court under extraordinary circumstances. It is not necessary to say whether, when there is an adjudication of the validity of a will of freehold estate after or without a trial at law, in a case in which the heir-at-law is a married woman, that adjudication can be questioned, on the ground that she was a married woman at the time, by her heir or by herself, after the coverture shall have determined. Cases of that description we desire to leave totally untouched, considering that this is not one of them. Subject to any observations which those opposing the present application are desirous of making, we consider at present that this is a case in which there has not been substantially an adjudication upon the will, inasmuch as the husband retired

1852.

 TURNER
 v.
 TURNER.

retired from that question when he had charge of the wife's interest. He, for himself and his wife, retired not on the ground that the will was good—not on the ground that if the contest proceeded the result would be favourable to the will, but on the ground that though the will was a bad one, there were reasons and inducement which led him, the husband, having the conduct of the cause, to think it was better that the will, though a bad will, should be established.

And we are at present disposed to think, subject to what we may hear, that it ought to be left open to the wife or her heirs hereafter to make what she or they can of that point; but that, during the life of the husband, the estate is effectually bound, so that, during his life, he being, if the will is bad, tenant by the courtesy, there cannot be a trial. Subject, therefore, to dealing with this case more unfavourably to those who support the application, after hearing those who oppose it,—if they shall desire to be heard,—what we at present propose to do is to vary the decree or order of the 14th of *February* 1833, by striking out the words expressing the consent of Mrs. *Meryweather*, and inserting at the end of it the following words:—"This decree or order is to be without prejudice to any suit or question which may be instituted or raised as to the validity of the said will after the death of the said *William Stevens Meryweather* and accordingly the said *Mary Ann Meryweather*, her heirs and assigns, are to be at liberty to institute, prosecute, or make any suit, proceeding, or application which she or they may be advised, after the death of the said *William Stevens Meryweather*, for the purpose of recovering the real estate of the said testator, on the ground that he left the said *Mary Ann Meryweather* his heiress-at-law, and of disputing the validity as to real estate of the said will."

Mr

Mr. *Roundell Palmer*, Mr. *Rolt*, Mr. *Wright*, Mr. *Hardy*, and Mr. *J. V. Prior* for the Respondents, referred to *Jackson v. Barry* (a).

1852.
TURNER
v.
TURNER.

Mr. *Villiers*, in reply.


The LORD JUSTICE KNIGHT BRUCE.

We have declared our opinion that without the consent of those opposing the present application nothing can be done to try the validity of the will during the life of the husband. The only question which we thought possibly difficult, was whether liberty should be reserved to dispute it after his death : it is a question theoretically of importance ; in this case, I believe, practically of none.

The LORD JUSTICE LORD CRANWORTH.

This is a case which, though we believe it practically to be of no importance at all, opens a number of very difficult and somewhat curious questions, namely, as to the rights of a husband as *dominus litis* in a suit in which his wife's inheritance is interested. There seems to be very great authority for saying (and all convenience, and all analogy to the old proceeding in respect of real actions, would seem to show by reason *à priori*, that this is the state of the law), that if there is a suit against the husband and wife in respect of the wife's inheritance, and the wife does not, or the husband and wife do not, at the time desire to have an issue, the Court may declare the will to be proved just as if she was not a married woman. All convenience, I say, seems to require that this should be the law. I cannot remember any case having come under my own experience, but if I had

(a) 2 *Cox*, 225.

1852.

 TURNER
 v.
 TURNER.


had been asked the question I should have said it was just the same whether she was a married woman or not, and that if she does not claim she must be bound. Mr. *Walker*, who is a registrar of very great experience, states it as his impression that it is very frequently done. He has brought us a note of two cases, and one was distinctly a case (*a*) in which that had been done; but on looking at the registrar's book, singularly enough the decree does not seem to have been entered, and although the decree was not entered there was an order made afterwards reciting it, and some directions given upon some interlocutory order about costs.

If it had been absolutely necessary to decide this question, we should probably have wished further time to make some further search for precedents. But assuming it to be the law that if the wife, or the husband acting for the wife, does not claim an issue at the time the cause comes to a hearing, the wife is bound, still in this case an issue was directed, and then arises this question: an issue having under these circumstances been directed, could the husband afterwards present a petition to vary that order, and to get rid of the issue. In my opinion he could not. That was a different proceeding altogether. He did not omit to claim an issue, but having claimed the benefit of an issue, he thought fit afterwards, on his wife's behalf, to compromise the suit. As was pointed out by my learned brother, that could not be done by analogy to the old form of proceeding in real actions, for although the wife was bound in them, yet when there was a compromise, as upon a fine or recovery, she was solely and separately examined.

It seems to me that the husband could not get rid of
 the

(*a*) *Barker v. Anderton* in 1839.

the right that the wife had acquired in 1832. If the husband could not do it by his own petition alone, he could not make it at all better by joining the wife as co-petitioner, still less can it be entered on the decree that she had consented. It is merely a superfluity of words that means nothing. What is the effect of the order that was made on that petition of the husband joining the wife with him? I believe we both are of opinion, that although inoperative in binding the inheritance as against the wife, it must be conclusive and binding as against the husband. Indeed, it is hardly necessary to determine that, because he was a party afterwards to an order which expressly proceeded on that footing, and the consequence of that is that he is for ever bound. He being tenant by the courtesy, and therefore entitled *sub modo* during his own life, has bound that inheritance, whether the will was or was not good. He is bound to act on the footing of there being a valid will so long as he lives.

1852.

 TURNER
 v.
 TURNER.

Then the question arises, whether we ought not to provide against the possible injustice to the wife, or those who come after her, of their being precluded from disputing that will after the husband's death. We think that we ought to make such a provision, that if, upon his death, Mrs. *Meryweather*, if she should then be alive, or her heir, if she should be then dead, should be minded to dispute this will, they should not be prejudiced by the act of the husband in having got rid of the order that was made in 1832, for the trial of an issue as to the validity of that will, but that they ought to have the same right as if the order of 1833 had never been made, and the petition had never been presented.

The LORD JUSTICE KNIGHT BRUCE.

I repeat that I consider the transaction of 1833 equivalent

1852.
TURNER
v.
TURNER.

lent to a compromise or sale, and not to an adjudication. The two proceedings stand in importantly different positions. The language in which we have framed minutes may be susceptible of improvement. We shall be glad to hear any observations upon it.

The following were the minutes of the order, as finally settled:—"Vary the decree or order of the 14th of *February* 1833, by striking out the consent of *Mary Anne Meryweather*, and inserting at the end of it the following words:—"That the decree or order is to be without prejudice to any suit or question which, after the death of the said *William Stevens Meryweather*, may be instituted or raised by the said *Mary Anne Meryweather*, her heirs or assigns, as to the validity of the will and codicil, or either of them." And accordingly the said *Mary Anne Meryweather*, her heirs and assigns, are to be at liberty to institute, prosecute, or make any suit, proceeding, or application, that she or they may be advised, after the death of the said *William Stevens Meryweather*, for the purpose of recovering the real estates of the said testator, on the ground that he left the said *Mary Anne Meryweather* his heiress-at-law, and of disputing the validity as to real estate of his said will and codicil, or either of them. The costs of all parties, of and consequent upon the petition of rehearing, including the costs of the trustees' motion at the Rolls, to take the petition off the file, and of the application to discharge the order of the Master of the Rolls thereon, to be costs in the cause."

1852.

KENT v. JACKSON.

March 20, 22.

THIS was an appeal from the decision of the Master of the Rolls, reported in the 14th Volume of Mr. *Beavan's Reports*, p. 16, where the facts are fully stated.

Before *The*
LORDS JUSTICES.

Mr. *Roundell Palmer* and Mr. *M. Archer Shee*, for the Plaintiffs.

Mr. *Walpole*, Mr. *Willcock*, Mr. *Amphlett*, and Mr. *W. Bovill*, for the Defendants.

The arguments and the authorities relied upon were the same as were adduced in the Court below.

The LORD JUSTICE KNIGHT BRUCE.

Whether upon the question of right, or upon the question of remedy, the law of *Belgium* or that of *England* is regarded, this suit seems to us ill founded. According to the law of *Belgium*, it appears that the Plaintiff is incompetent to sue for the purpose for which he has filed the present bill; and, according to the law of *England*, he has neither proved nor alleged a case

By the rules of a foreign Railway Company, established as a Société Anonyme, it was provided that the general meeting convened by notice should represent the whole body of shareholders, and should take cognizance of the accounts and balances, and that their approval of the balances should completely discharge the board of directors. Two of the English directors retired in consequence of the small amount

entitling paid up. Afterwards, by the sanction of the solicitor appointed by the committee of management, they returned to several English subscribers the amount of their deposits without interest, and bought up the shares of others, and paid over the balance of the deposits in their hands to the continuing directors of the Company, who received it and sanctioned the transaction. Some shareholders on behalf of themselves and the others filed a bill against the directors, alleging that the Company had carried on their affairs in conformity with the rules, and praying that the two retired directors might make good the returned deposits. It appeared that the accounts had been fairly submitted to the general meeting, and passed. Held that the general meeting had power to sanction and had sanctioned the proceedings, and that the bill had been properly dismissed.

1852.

DAVIES v. DAVIES.

March 12, 29.

THIS was the petition of a Defendant, named *Sarah Frances d'Arley Davies*, a person of unsound mind, (though not found to be such by inquisition,) by her mother, and guardian. Her mother, and her brother, *Henry Philip Davies*, were co-petitioners with her. The petition prayed that a sum of 762*l.* 16*s.*, 3*l.* per Cent. Consolidated Bank Annuities, to which the petitioner, Miss *Davies*, was entitled, and which was standing in trust in the cause, might be applied to the purchase of an annuity for the life of Miss *Davies*, pursuant to the stat. 48 *Geo.* 3, c. 143, in the joint names of herself, her brother, and mother, to be applied by them, or the survivor of them, to her maintenance; or otherwise that the dividends already accrued and to accrue upon the said sum of 762*l.* 16*s.*, 3*l.* per Cent. Consolidated Bank Annuities, might be paid to the petitioners, Mrs. *Davies*, and *Henry Philip Davies*, or the survivor of them, to be applied to the maintenance of Miss *Davies*.

Before *The*
LORDS JUSTICES.

Where a Defendant of unsound mind, not found so by inquisition, was entitled to a capital sum, the income of which was insufficient for her maintenance, the Court directed nearly the whole of it to be laid out in the Defendant's name in purchase of a government annuity, and that the income should be applied for her maintenance.

A Vice-Chancellor has jurisdiction to make such an order.

The petition, and the affidavit in support of it, stated that the petitioner, Miss *Davies*, would be forty-seven years of age in *December* 1852; and that for the whole of the period of seventeen years and upwards last past, she had been and still was of unsound mind, and incapable of taking care of her affairs; that during the whole of that period, with the exception of four days, she had been and still was under the care of Dr. *Monro*, at *Brooke House, Clapton*. That by an order made in the causes, dated the 6th day of *December* 1850, made upon the death of a tenant for life, Miss *Davies* became and was absolutely entitled to the above-named sum

1852.
 {
 DAVIES
 v.
 DAVIES.


of 762*l.* 16*s.*, 3*l.* per Cent. Consolidated Bank Annuities, which had been carried over to an account, intituled "The Account of the Defendant *Sarah Frances D'Arley Davies*," and that she was also entitled to 41*l.* 19*s.* 5*d.*, cash, standing to the same account. That the other property of Miss *Davies* was a reversionary interest in one-seventh part of 3600*l.*, 3*l.* per Cent. Consolidated Bank Annuities, subject to a life interest of a person aged forty-two; a life interest in the dividends, of 600*l.*, 3*l.* per Cent. Reduced Bank Annuities; and one-seventh part of the reversion of that fund. That the expense of maintaining and keeping her at *Brooke House* had amounted and still amounted to 50*l.* per annum, or thereabouts; which, with 10*l.* for clothing, had been defrayed and paid, for some time, partly out of the dividends of the 600*l.*, 3*l.* per Cent. Reduced Bank Annuities, the deficiency being defrayed and paid by the mother, and the brother, and sisters of Miss *Davies*; but that of late, and for some time past, the deficiency had been made up by the mother alone. That the mother was seventy-nine years old, or thereabouts, and of infirm health; that her income was derived solely from an estate, for her life only; that she had not the power nor the means of making provision after her decease for the petitioner, Miss *Davies*; that the yearly income of her property did not exceed 40*l.* 17*s.* 8*d.*, which was greatly insufficient for her suitable maintenance; and that the said 762*l.* 16*s.*, 3*l.* per Cent. Consols, at the present value thereof, would purchase a Government Annuity, for her life, of 43*l.* 4*s.* 9*d.*, or thereabouts.

Mr. *Stevens* supported the petition (which was unopposed), and said that the Vice-Chancellor, before whom the cause was, suggested that the matter should be brought before this Court.

The

The LORD JUSTICE KNIGHT BRUCE.

As the petition is in a cause, the Vice-Chancellors have as much jurisdiction as we have (*a*). But we may as well dispose of the case. Has any thing so strong been done as to deal with capital under circumstances such as those here? The jurisdiction may probably be a wholesome one, if it can be exercised.

1852.

 DAVIES
v.
 DAVIES.

The LORD JUSTICE LORD CRANWORTH.

I wish very much to do what is asked. It would only be carrying one step further, that which this Court is continually in the habit of doing with reference to applying part of the capital of an infant for payment of an apprenticeship fee when the fund is small. I think 600*l.* of this particular fund might be applied, leaving a small balance in case of necessity.

The case stood over to give time to inquire whether a government annuity could be purchased in the name of the Accountant-General, according to the practice in the Accountant-General's office.

On this day Mr. *Leach*, the Registrar, stated to the Court that the Accountant-General did not consider himself authorized to become the purchaser of the annuity, or to allow it to be purchased in his name, there being many difficulties of form, and also some serious objections to that course under the statute authorizing the purchase of life annuities. Mr. *Leach* had however ascertained that the Commissioners for the Reduction of the National Debt would act upon an order in the following form, which was ultimately made :—

“ It

(*a*) See *Volans v. Carr*, 2 De G. & S. 242.

1852.
 {
 DAVIES
 v.
 DAVIES.

“It is hereby ordered, that the petitioner *Henry Philip Davies* be at liberty to enter into a contract with the Commissioners for the Reduction of the National Debt, for the purchase, in the name and on the life of the petitioner *Sophia Frances d’Arley Davies*, spinster, a person of unsound mind, of such a government annuity as can be purchased by a transfer to the said Commissioners of 600*l.*, 3*l.* per Cent. Bank Annuities, part of 762*l.* 16*s.*, like annuities, standing in the name of the Accountant-General of this Court, in trust in the cause *Davies v. Davies*, ‘the account of the petitioner *Sophia Frances d’Arley Davies*,’ be transferred to the Commissioners for the Reduction of the National Debt, as the consideration for the purchase of such annuity. And it is ordered, that the said Commissioners do pay the said annuity to the said petitioner *Henry Philip Davies* until the further order of this Court, he undertaking duly to apply the same towards the maintenance of the said petitioner *Sophia Frances d’Arley Davies*. And it is ordered, that the interest to accrue due on 162*l.* 16*s.*, 3*l.* per Cent. Bank Annuities, residue of the said 762*l.* 16*s.* like annuities, after the transfer hereby directed, be from time to time, as the same shall become due, paid to the said petitioner *Henry Philip Davies* during the life of the said *Sophia Frances d’Arley Davies*, or until the further order of this Court, upon the like undertaking. And it is further ordered, that it be referred to the Taxing Master of this Court in rotation to tax the petitioners’ costs of and relating to this application, and consequent thereon; and that the said costs, when taxed, be paid out of the sum of 41*l.* 19*s.* 5*d.* cash in the Bank on the credit of the aforesaid cause and account, to Mr. *Francis Christopher Vernon Pike*, their solicitor. And it is ordered, that the residue of the said sum of 41*l.* 19*s.* 5*d.* cash, after payment of the said costs (such residue to be certified by the said Taxing Master), be paid to the said

Peter

Peter Henry Philip Davies, upon the like undertaking. But in case the said cash shall be insufficient to pay the total amount of such costs, then it is ordered, that the said sum of 4*l.* 19*s.* 5*d.* cash be paid to the said *Francis Christopher Vernon Pike*, he consenting to receive the same in full discharge of the said costs."

1852.
DAVIES
v.
DAVIES.

EDWARDS v. BURT.

March 13, 18.
April 2.

THIS was an appeal from the decision of the Master of the Rolls, dismissing the bill which was filed by the vendor of a reversionary interest, to set aside a sale for inadequacy of price, and on the ground of undue influence. The facts are fully stated in the judgment.

Before *The*
LORDS JUSTICES.

Mr. *Anderson* and Mr. *Godfrey*, in support of the appeal.

Mr. *Bethell*, Mr. *R. Palmer*, and Mr. *Greene*, for the Respondent, referred to *Headon v. Rosher* (a), *Edwards v. Browne* (b), *Aldborough v Trye* (c).

If previously to the sale of a reversionary interest, the vendor and purchaser concur in ascertaining from persons of competent skill, and having knowledge of the property and of all the circumstances likely to influence its

value, a well considered estimate of what the property would be likely to fetch at a sale, and act on that opinion. *Semble*, that such a transaction would not be afterwards disturbed merely because other surveyors afterwards came to a different conclusion from that on which the parties acted. It is not necessary to give validity to such a sale that it should be made by public auction. But where, upon the sale by private contract of such an interest in leaseholds, nothing was done except obtaining the opinion of an actuary unacquainted with the local circumstances likely to influence the value, and in a suit to impeach the sale the purchaser was unable to show that he had given the full value, the sale was set aside.

(a) *M'Clcl. & Y.* 89.

(b) 2 *Coll.* 100.

(c) 7 *Cl. & Fin.* 436.

1852.

EDWARDS

v.

BURT.

Mr. *Anderson*, in reply.*Cur. adv. vult.*

April 2.

The LORD JUSTICE LORD CRANWORTH.


The bill filed in this cause seeks to set aside two sales made, one in the month of *October* 1846, and the other in *February* 1848, being sales by the Plaintiffs to the Defendant of the reversionary life estate of the Plaintiff, Mrs. *Edwards*, in some real property at *Reigate*.

The interest of Mrs. *Edwards* was derived under the will of *John Carter*, who died in 1825. Under that will *Mary Compton*, the mother of Mrs. *Edwards*, was tenant for life of the property in question, with remainder to Mrs. *Edwards* for her life, and in the month of *October* 1846, Mrs. *Compton* was 74 years of age, and Mrs. *Edwards* 38. The relief is sought on the ground that the Plaintiffs had been induced to part with their reversion at materially less than the fair value, so that this Court ought not to allow the transaction to stand. The bill alleges further, that at the time of these sales the Defendant was acting as the solicitor of the Plaintiffs, and so exercised an influence over them; and it suggests circumstances of undue pressure on the part of the Defendant, which, independently of the question of value, might entitle the Plaintiffs to relief; but as we intimated at the hearing, those allegations and suggestions are not established by the evidence, and the case must therefore be considered merely with reference to the point of value.

The doctrine on this head of equity has been the subject of frequent discussion in modern times, from the decisions of *Peacock v. Evans* (a), and *Gowland v. De Faria*,

(a) 16 *Ves.* 512.

Faria (a), before Sir *William Grant*, down to that of *Edwards v. Brown* (b), before my learned Brother ; but it is unnecessary now to canvass or discuss the principles, for the rule on this subject was finally and distinctly established by the House of Lords in *Lord Aldborough v. Trye* (c), and that case, following several of the previous authorities, clearly establishes that the purchaser of a reversionary interest, or, at all events, the purchaser of such an interest from an expectant heir, or from a person standing in the situation of an expectant heir (and the Plaintiff Mrs. *Edwards* clearly sustained that character) is bound, if the transaction is impeached within a reasonable time, to satisfy the Court, that he gave the fair market value for what he purchased.

1852.

 EDWARDS
 v.
 BURT.

Applying then that rule to the facts now before us, what we have to determine is whether the case furnishes evidence to satisfy us that 250*l.* was the fair market value of the reversionary interest sold in 1846, and 500*l.*, with the additional 50*l.*, payable contingently, a fair and sufficient price for the reversion sold in 1848. We think that the case does not furnish such evidence.

With respect to the property comprised in the first purchase, the evidence of Mr. *Nash*, one of the Plaintiffs' witnesses, states that the market value, if it had been in 1846 by public auction, would have been 501*l.* 4*s.* Mr. *Crawter*, the other surveyor, examined on behalf of the Plaintiffs, puts the value much higher, namely, at 840*l.* Both these witnesses are surveyors of experience, well acquainted with the property, so that they had the best means of forming a correct judgment.

They certainly differ widely in their estimated value.
 But

(a) 17 *Ves.* 20. (b) 2 *Coll.* 100.
 (c) 7 *Cl. & Finn.* 436.

1852.
EDWARDS
v.
BURT.


But the question is not whether on their testimony we should be prepared to say we were satisfied that the value was such as they represent, but whether, in the face of their evidence, we can say we are satisfied that the price actually paid, namely, 250*l.*, was the fair value. In order to enable us to do so, the Defendant has examined two surveyors, Mr. *Shuttleworth* and Mr. *Marsh*, and they, treating this property not as it actually existed at the time of the sale, but as a well-secured annuity of the same yearly value as the actual rent, say that its market value was 318*l.* according to Mr. *Shuttleworth*, or 321*l.* according to Mr. *Marsh*.

It thus appears that, according to the Defendant's own witnesses, the price paid (250*l.*) was less by about 70*l.* than the fair market value, being a deficiency of above a fourth of the actual consideration.

We have not forgotten the argument of the Defendant's counsel, that some deduction ought in fairness to be made from the estimate of his surveyors, in consequence of their not having taken into consideration the perishable nature of a large portion of the property, consisting as it does in part of a pottery, and the want of repair in which the buildings are represented to have been. But this is not a matter which can justly be insisted on by the Defendant. He is himself an inhabitant of *Reigate*, and must have been perfectly acquainted with the property. The burthen is on him to show that 250*l.* was the fair market value, and it would be contrary to all principle that he should be allowed to abstain from examining (as he might easily have done) persons of skill acquainted with the property, and then call on the Court to make such deductions from the estimates of those whom he produces, in consequence of their imperfect acquaintance with the subject-matter of their testimony.

Considering

Considering then, that, according to the evidence on the part of the Plaintiff, unsatisfactory as we conceive that evidence to be, the sum paid was less than half the market value, and that the Defendant has offered no sufficient evidence to show that he paid the full value, we have come to the conclusion that this transaction cannot be sustained.

1852.

 EDWARDS
 v.
 BURT.

The case as to the second transaction, *i. e.* the sale of Mrs. *Edwards'* life interest in the house and land let on lease to Mrs. *Wood*, is not perhaps so clear, but still we think that the Defendant has failed to make out, as he was bound to do, that 500*l.*, with an additional 50*l.* to be paid on the death of Mrs. *Compton* if she should die within ten years, was the fair market value. The property sold was Mrs. *Edwards'* reversionary life interest in a house and land let to Mrs. *Wood* on a lease for twenty-one years, commencing in 1840. The tenant appears on the evidence to have laid out money in improving the house, and the uncontradicted evidence of the Plaintiffs' surveyors goes to show that the property, if now to be let on lease, would probably yield a much higher rent; one of the surveyors puts the value at 120*l. per annum*, the other as high as 160*l.* It is impossible not to infer from this that the subject-matter of the sale in 1848 was a perfectly well-secured annuity of 100*l. per annum* for thirteen years, with a probability of a material increase at the expiration of Mrs. *Wood's* lease in 1861. Now, one of the Plaintiffs' surveyors estimates the market value of the reversionary life interest of Mrs. *Edwards* in this property at 1100*l.*, the other at 900*l.* They distinctly give those sums as the amount which in their judgment the property would have realised on a sale by auction. Mr. *Smith*, the actuary of the *Eagle* office, states the calculated value of the interest sold, treating it as a well-secured annuity of 100*l. per annum*,
 to

1852.
EDWARDS
v.
BURT.

to be 870*l.*, from which, however, he says one-third ought to be deducted in estimating the probable result of a sale, thus making the true market value 580*l.*, being 30*l.* less than the Defendant was under any circumstances to pay, and 80*l.* less than he was to pay if Mrs. *Compton* had lived for ten years.

Now on this evidence we make the same observation as on that relating to the other property, namely, that if the question had been whether the Plaintiffs had satisfied us what the true value of the property was, we should have been unable to answer in the affirmative. Neither Mr. *Nash* nor Mr. *Crawter* explains the grounds on which his opinions are formed, the difference between the sums which the one and the other state as being the true market value is considerable, the one putting it at two-ninths higher than the other. And there certainly is nothing to show that they were aware of the existence of a lease for twenty-one years from 1840, at a rent of 100*l.* per annum. The actuary puts the calculated value, treating the property as a mere annuity, at 30*l.* less than the estimate of the lowest value as given by the surveyors. If therefore we had to say on the Plaintiffs' evidence what the fair market value was in 1848, the time of the sale, we should have felt great difficulty in coming to any satisfactory conclusion. But it is not our province to decide what the value was, all we have to say is whether the Defendant has made out that 500*l.*, with 50*l.* additional in the event of Mrs. *Compton* dying in ten years, was the fair market value.

This we think is not made out. The evidence of the Plaintiffs' two surveyors, taking a mean between them, makes the value 1000*l.*, *i. e.* double the price actually paid, a difference which it is impossible to explain by any suggestion that they might not have been
aware

aware of Mrs. *Wood's* lease. The value of the property calculated by an actuary, treating it as a mere annuity of 100*l.* per annum, is fixed by him at 870*l.*, but in coming to this conclusion he certainly did not take into account the probable rise in value at the end of thirteen years from 1848, when the lease to Mrs. *Wood* would expire. On the contrary, the Defendant says that one reason why the actuary put the market value at only two-thirds of the calculated value, was the risk that there might be loss of rent in case the property should be unlet; he also relied on the expenses of repairs, insurance, and other outgoings incident to house property. Whether these were expenses to be borne by Mrs. *Wood*, the tenant, was not shown.

1852.
EDWARDS
v.
BURT.

The Defendant's evidence on the subject of the value of this property consisted of the testimony given by Mr. *Shuttleworth* and Mr. *Nash*, the same gentlemen who were examined as to the sale in 1846.

They agree in fixing the market value at 475*l.* or 476*l.*, plainly treating the subject-matter which they were employed to value as a mere well-secured annuity, worth $4\frac{3}{4}$ years' purchase. It is to be regretted that the Defendant did not, instead of resting on the mere speculative opinions of *London* surveyors, recur to competent persons on the spot, who would evidently from local knowledge have had much better means of judging of value than could possibly be possessed by persons, however eminent, who, so far as appears, never saw the property in their lives. The evidence of the surveyors examined by the Plaintiffs is at least the evidence of persons who knew the property well, and so had the means of forming a correct judgment; one of them Mr. *Nash* says, that the market value on a sale was 900*l.*,
thus

1852.
EDWARDS
v.
BURT.

thus agreeing very nearly with the calculated value 870*l.* as given by the actuary. It is true that the actuary said that the market value was not more than two-thirds of the calculated value, but then he gives as his reason for that opinion, that the nature of the property was such as to make it liable to certain risks and outgoings, which perhaps witnesses acquainted with the neighbourhood and with the circumstances of the case might have known to be entitled to little or no attention, and in fact might consider to be more than compensated by the probable rise in value at the end of the twenty-one years' term.

That the Defendant himself places little reliance on the testimony of his own surveyors may be fairly inferred from his answer, for he states that he believes the value of the property was 580*l.*, not 475*l.* or 476*l.* as estimated by his surveyors. And even if 580*l.* was the true market value the sum paid was still too small, for the difference between 580*l.* and 500*l.*, with an additional 50*l.* payable only on a contingency, is not to be disregarded.

Contrasting then the evidence of value given by the Defendant with that of the Plaintiffs, we have come to the conclusion that the Defendant has not, as he was bound to do, shown that the consideration given on occasion of this second purchase was the fair market value at the time of the sale, and, he having failed to show this, the transaction cannot stand.

It was contended that as to both transactions some deduction ought to be made in estimating the price which could probably have been obtained by reason of the inability of the Plaintiffs to furnish an abstract. This circumstance is alluded to by Mrs. *Edwards* in her
first

first letter to the Defendant, but no one afterwards seems to have paid any regard to it. In truth, persons selling reversionary interests seldom can be in a position to produce title deeds or to furnish a perfect abstract. But the testator, under whose will the vendors derived their title to the property sold, had been dead above twenty years; possession had, no doubt, gone since his death in conformity with the devises contained in the will; the will seems to be that of a person who had been an established resident at *Reigate*, and who had acquired considerable property in and near that place, and who himself occupied the house now let to Mrs. *Wood*. In all probability, therefore, the inability of the Plaintiffs to furnish an abstract was not considered by any one as a circumstance really calculated to influence the saleable value.

It was then urged upon us, that if we should set aside the present transactions on the ground of undervalue, we should in effect be deciding that no sale of a reversion can be sustained unless it be made by public auction. This we certainly do not mean to decide. But here not only the sale was not a sale by auction, but no effectual steps were taken to acquire a knowledge of the market value before the bargains were completed. As to the first transaction, no steps whatever were taken. As to the second, nothing was done except to obtain the opinion of an actuary, and such an opinion is evidently very unsatisfactory with reference to the local circumstances likely to influence market value. Indeed on such a subject an actuary is by no means the best authority to refer to. If, previously to the sale of a reversionary interest, the vendor and purchaser concur in ascertaining from persons of competent skill and having knowledge of the property, and of all the circumstances likely to influence value, a well-considered estimate of what

1852.

EDWARDS

v.

BURT.

1852.
EDWARDS
v.
BURT.

what the property would be likely to fetch on a sale and act on that opinion, we are far from meaning to decide that such a transaction could be afterwards impeached, merely because other surveyors should come to a conclusion different from that on which the parties had acted. The Court would probably in such a case be much inclined as a matter of fact to believe the original and not the subsequent estimate to be correct; but nothing of the sort occurred here, and we advert to the point only to explain that we do not concur in the suggestion that no sale of a reversionary interest otherwise than by auction can be sustained.


We think that neither of the sales, impeached by the present bill, can be supported; not because they were sales by private contract, but because—it being incumbent on the Defendant to show that the price given by him was the fair market value—he has failed in doing so.

We thus come to a result, not conformable to that at which the Master of the Rolls arrived, and this can hardly be matter of surprise on a doubtful question of fact, such as that of market value, which different minds may naturally view in very different lights.

The consequence of the conclusion at which we have thus arrived is, that the two sales must be set aside; and it must be declared, that the deeds ought to stand only as a security to the Defendant for the sums actually advanced by him, including, according to what was consented to by Mr. *Anderson* at the hearing, the money advanced for premiums on the policies of insurance, with interest at the rate of 5*l.* per cent., that being the rate generally given in cases like the present.

The

The Defendant is entitled to his costs of suit, except the costs of such of the depositions as relate to the state and value of the property. Those costs have been incurred in an endeavour to prove what the Defendant has failed to make out, and no costs should be given on either side on this part of the case; but the rest of the costs was occasioned by the unfounded charges in the bill, imputing to the Defendant undue influence and pressure on the Plaintiffs.

1852.

 EDWARDS
 v.
 BURT.

Subject to the foregoing declaration, the Plaintiffs must have the decree, usual in such cases, treating the Defendant as liable to account for the rents, on the footing of his being a mortgagee in possession; and on payment to the Defendant of the balance found due to him he must reconvey the property comprised in both deeds, and assign the policies to the Plaintiffs.

If both parties prefer to have a sale, that course may be pursued, but that can only be done by arrangement.

1852.

March 25. In the Matter of The EASTERN COUNTIES JUNCTION and SOUTHEND RAILWAY COMPANY, and of The JOINT-STOCK COMPANIES WINDING-UP ACTS.

MAINWARING'S CASE.

Before *The*
LORDS JUSTICES.

A provisional committee-man of a provisionally registered Railway Company on the 9th of October, 1845, wrote to the secretary in answer to an inquiry made by the latter, as follows :
"I should wish to have 100 shares reserved for me." Nothing further took place till the 21st of November, when the secretary wrote to the committee-man as follows: "The committee of

THIS was an appeal from a decision of Vice-Chancellor *Parker*, affirming that of the Master, whereby the Appellant's name was retained upon the list of contributories to the above Company.

In *May* 1845, a projected Company was provisionally registered under the name of the *Eastern Counties Junction and Southend* Railway Company, for the purpose of constructing a railway commencing at the *Romford* station of the *Eastern Counties* Railway, with branches to *Southend, Essex*. In *September* 1845, a prospectus was issued, in which the Appellant's name appeared as one of the Provisional Committee, and on the 6th of *October* 1845, the following letter was sent to him by the secretary :—

"*Eastern Counties Junction and Southend* Railway Company Office, 33, *Broad Street Buildings, London*, 6th *October* 1845. Sir,—I am instructed by the Committee of Management to inform you, that by a resolution

management are of opinion that the payment of the deposit should be no longer delayed; they therefore request that you will be so good as to pay the deposit on the 100 shares accepted by you." On the 27th, the committee-man replied thus: "Inform me whether a sufficient amount of deposits has been paid up to enable the Company to go to Parliament this session, and if all the Provisional Committee have paid their deposits. Should that be the case, I shall not hesitate to pay also, that is upon being clearly satisfied on these points." *Held*, that this was a conditional acceptance only, and the condition not having been performed, that the committee-man was not a contributory.

tion passed by them you are, as a member of the Provisional Committee, entitled to 100 shares in this Company, or any less number you wish, provided you signify in writing on or before the 9th instant the number you are desirous of taking. Signed, *R. H. Causton*, Secretary. *John Mainwaring*, Esq."

1852.
MAINWAR-
ING'S CASE.

To this the Appellant replied as follows:—" *Eagle Hall*, October 9th, 1845. Sir,—My absence from home prevented me sooner replying to yours of the 6th instant, I should wish to have 100 shares reserved for me. Yours obediently, *John Mainwaring*. *R. H. Causton*, Esq."

Nothing further took place until the 21st of *November*, except that, according to the Respondent's statement, a letter of allotment had been sent to the Appellant. No such letter was however in evidence. On the 21st of *November* the Appellant received the following letter:—" *Eastern Counties Junction and Southend Railway Company Office*, 33, *Broad Street Buildings*, *London*, 21st *November* 1845. Sir,—The plans and sections of the *Eastern Counties Junction* and *Southend Railway* being nearly ready for deposit on the 29th inst. agreeably to the standing orders of the House of Commons, the Committee of Management are of opinion that the payment of the deposit money should be no longer delayed; they therefore request you will be so good as to pay forthwith the deposit on the 100 shares accepted by you as a member of the Provisional Committee, agreeably to your letter of the 9th ultimo. I have the honour to be, Sir, your obedient servant, *R. H. Causton*, Secretary. *John Mainwaring*, Esq. P.S.—Your letter of allotment has already been forwarded, and the bankers of the Company are directed to receive the amount."

1852.

 MAINWAR-
 ING'S CASE.

The Appellant replied as follows:—“ *Eagle Hall, Ripon, November 27th, 1845.* Sir,—In reply to your letter of the 21st instant calling upon me to pay the deposit on 100 shares in the *Eastern Counties Junction and Southend Railway*, I must beg that you will have the goodness to inform me whether a sufficient amount of deposits has been paid up to enable the Company to go to Parliament this session, and if all the other members of the Provisional Committee have paid their deposits. Should that be the case I shall not hesitate to pay also, that is upon being already satisfied on these points. I am, Sir, your most obedient servant, *John Mainwaring.* *R. H. Causton, Esq.*”

Mr. *Lee*, and Mr. *F. S. Williams*, in support of the Appeal.

There was only a conditional acceptance, and it does not appear that the condition was ever performed, and it cannot now be performed. Nor does there appear to have been any allotment of shares to the Appellant.

They referred to *Ashpitel v. Sercombe (a)*, *Onions' case (b)*, and *Conway's case (c)*.

Mr. *Daniel* and Mr. *Wordsworth*, for the Official Manager.

If the Appellant meant to dispute that he had received the letter of allotment, or that he had accepted the shares, he should have said so in his answer to the letter of the 21st of *November*, in which these facts are stated. They must therefore be taken to have been admitted by him, and after allowing the Company to proceed upon the admission, it is too late for him to attempt to retract it.

Mr.

(a) 5 *Exch.* 147 ; 6 *Railw. Ca.* 224.

(b) 1 *Sim. N. S.* 394.

(c) 5 *De G. & S.* 150.

Mr. *Lee*, in reply, was stopped by the Court.

The LORD JUSTICE LORD CRANWORTH.

1852.

MAINWAR-
ING'S CASE.

We think this does not come within *Upfill's case*, because we think that there has been no acceptance of shares. Mr. *Mainwaring's* name is put on the Provisional Committee on the 30th of *September* 1845, for the first time. On the 6th of *October*, the first meeting of the Committee of Management, the governing body, of which there is any record, took place. On that day Mr. *Causton*, who had been one of the promoters of the scheme, was appointed secretary; and on the same day, but I suppose after that appointment, he wrote a letter to Mr. *Mainwaring*, telling him that he was, as a member of the Provisional Committee, entitled to 100 shares, or any less number, provided he signified in writing, on or before the 9th instant, the number he was desirous of taking. In answer to that letter, Mrs. *Mainwaring* wrote, in her husband's absence, on the 7th of *October*, saying that her husband was from home, and that she could not say whether he would take the shares, but that he would write when he returned home; but she asked that 100 shares might be "reserved" for a day or two longer. When Mr. *Mainwaring* returned home, on the 9th of *October*, he wrote thus:—"My absence from home prevented me sooner replying to yours of the 6th instant. I should wish to have the 100 shares reserved for me."

I expressed an opinion in *Onions' case* (a), to which I still adhere, that I was not satisfied that that mode of expression was tantamount to an acceptance, and I am borne out in that here, where, in the other letters, acceptance and reservation seem to be spoken of as different

(a) 1 *Sim. N. S.* 394.

1852.

 MAINWAR-
 ING'S CASE.

ferent acts. If that be so, there is no evidence of acceptance of shares on the 9th of *October*, and the Vice-Chancellor seems to have been of the same opinion. Of that opinion are both my learned brother and myself. We are of opinion, that the expression used does not mean "I accept the shares," because the acceptance and the reservation of the shares were considered by the writer, as I have before said, as different things.

Then there being no evidence of acceptance on the 9th of *October*, nothing is done for a long time. On the 21st of *November*, a letter was written by Mr. *Causton* to Mr. *Mainwaring*, in which he says, "the plans and sections of the *Eastern Counties Junction* and *Southend* Railway, being nearly ready for deposit on the 29th instant, agreeably to the standing orders of the House of Commons, the Committee of Management are of opinion that the payment of the deposit money should be no longer delayed; they therefore request you will be so good as to pay forthwith the deposit on the 100 shares accepted by you as a member of the Provisional Committee, agreeably to your letter of the 9th ultimo." Thus, he admits that there was no acceptance, unless the direction to reserve shares in the letter of the 9th of *October* were to be considered as one, but which we do not consider to be an acceptance. The postscript of the letter adds:—"Your letter of allotment has already been forwarded, and the bankers of the Company are directed to receive the amount." On the 27th, Mr. *Mainwaring* writes in answer:—"I must beg that you will have the goodness to inform me whether a sufficient amount of deposits has been paid up to enable the Company to go to Parliament this session, and if all the other members of the Provisional Committee have paid their deposits. Should that be the case, I shall not
 hesitate

hesitate to pay also, that is, upon being clearly satisfied upon these points."

1852.

MAINWAR-
ING'S CASE.

Now, what we think is the fair inference from that, is no more than this,—“not that I accede to your view or interpretation of my conduct, that I have before accepted,” but “I accept subject to these qualifications;” and there is no evidence that these qualifications have been complied with; on the contrary, the evidence clearly shows they had not been complied with, and never could be complied with. Therefore it amounts to no more than this: the secretary writes, saying, “You did accept on the 9th of *October*; you had a letter of allotment, and we call on you to pay the deposit.” Upon which Mr. *Mainwaring* in substance says, “I do not trouble myself to argue as to the effect of what I have already done; satisfy me that the scheme is ready to go to Parliament, and I will accept the shares and pay my deposits.” As this was not done, there was no positive acceptance, as there was in *Upfill's case* (a). I give no opinion upon the other point, whether there has been a substantial variation between the scheme originally proposed, and subsequently engaged in by the Company. For the reasons I have stated, I am of opinion that this gentleman's name should be removed from the list of contributories.

The LORD JUSTICE KNIGHT BRUCE.

Considering the case as it would stand if the letters of the 21st and 27th of *November* were out of the question, there is not only, in my opinion, a total absence of evidence of allotment, but strong reason to believe that there was none. Then how is the matter varied by these two letters? It was argued, by the counsel for the Respondents,

(a) 2 *H. L. Cases*, 674.

1852.
MAINWAR-
ING'S CASE.

Respondents, that by the letter of allotment mentioned in the postscript of the letter of the 21st of *November*, was meant either nothing, or a letter not produced. If the letter of the 21st of *November* ought to be considered rather in the nature of a proposal than of anything else, and the proposal had been unconditionally accepted, the case might have stood more favourably for the Respondents. But the letter of the 27th is a conditional acceptance only of the proposal, if any, made by the letter of the 21st, and the condition was never fulfilled. I come to the same conclusion as Lord *Cranworth*, and substantially on the same ground.

It is satisfactory to us to hear that the matter took a different course before the Vice-Chancellor from that which it has taken here. Had it been brought so fully before his Honor, he would, I think, probably have taken the same view as we have. What we now do is to be without prejudice to the production of additional evidence by the Official Manager, in order that Mr. *Mainwaring's* name may, if it ought to be, placed on the list of contributories. The costs of all parties must come out of the estate.

1852.

Between WILLIAM FRANCIS, late an Infant,
Plaintiff,

March 26.

and

HENRY FRANCIS, ABSALOM FRANCIS, and
ALICE FRANCIS, Defendants;

AND

Between the said WILLIAM FRANCIS, Plaintiff,

and

JOHN FINCH, WILLIAM THOMAS, and
GEORGE MORGAN, Defendants,

And in the Matter of WILLIAM HICHENS and
WILLIAM HICHENS the Younger.

THIS was a suit and supplemental suit, by an infant *cestui que trust*, under a will for the administration of the estate of the testator.

Before *The*
LORDS JUSTICES.

The Defendants, *Absalom Francis* and *Henry Francis*, the executors, by their joint answer, admitted that a sum of 1000*l.* secured by a mortgage therein mentioned, and the sum of 1746*l.* 10*s.* 4*d.* part of another sum of 2000*l.*, secured by another mortgage, were part of the residuary personal estate of the testator, which had come to the hands of *Henry Francis* as one of the executors, and

In an administration suit instituted by an infant *cestui que trust* under a will against the executors, one of the executors admitted that part of certain sums advanced by

him on mortgage formed part of the trust estate. An order was made in the suit for the completion of contracts for sales of the mortgaged property which had been entered into by the executor. Under this order the purchase-moneys were paid into court to the credit of the cause. The order directed the executor to execute the conveyances, and deliver the title-deeds to the Petitioners; but the executor's solicitors refused to give up the deeds claiming a lien upon them for costs due from the executor and advances made for the maintenance of the Plaintiff. *Held*, that the Court had jurisdiction on petition to order the solicitors to deliver up the deeds.

1852.
 FRANCIS
 v.
 FRANCIS.

they also admitted that the clear residuary personal estate of the testator come to the hands of the Defendant, including the above sums, amounted to the sum of 3246*l.* 10*s.* 4*d.*

The *Chester and Holyhead* Railway Company took for the purposes of the Railway a part of the hereditaments comprised in the mortgages, and the purchase and compensation monies payable by them to *Henry Francis*, in respect of the same, were ascertained and adjusted at the sum of 500*l.*, and *Henry Francis* executed a conveyance of the hereditaments to the Company, but had not delivered it to them.

On the 5th of *February* 1846, *Henry Francis*, in pursuance of the powers of sale vested in him by the secondly above-mentioned indenture of mortgage, contracted with one Mr. *Humphreys*, for the absolute sale to him of all the hereditaments comprised in that mortgage (except those taken by the Railway Company).

By an order made in the cause, on the 14th of *June* 1851, on the petition of the Plaintiff *William Francis*, it was ordered that Mr. *Humphreys* should be at liberty, on or before the 25th of *July* then next, to pay into the Bank, to the credit of the first-mentioned cause, the sum of 905*l.*, subject to the further order of the Court; and upon such payment being made thereof, it was ordered that the Defendant *Henry Francis* should deliver up to Mr. *Humphreys* the conveyances of the property, and all other deeds, papers, and writings relating to the hereditaments in his possession or power; and it was ordered that the *Chester and Holyhead* Railway Company should be at liberty, on or before the 27th of *July* then next, to pay into the Bank, to the credit of the first-mentioned cause, 500*l.*, together with the sum
of

of 41*l.* 13*s.* 4*d.*, the amount of interest thereon ; and on such last-mentioned payment being made, it was ordered that the Defendant *Henry Francis* should deliver up to the Railway Company the conveyance to them ; and it was ordered that the several sums, when paid in, should not be paid out without notice to *William Hichens* and *William Hichens* the younger, the solicitors of the Defendant *Henry Francis*, as well as to Mr. *Humphreys* and the Railway Company.

1852.


 FRANCIS
 v.
 FRANCIS.

The sums of 905*l.* and 541*l.* 13*s.* 4*d.* were accordingly paid into the Bank, and were now standing to the credit of the first-mentioned cause ; but *Henry Francis* had not delivered the several deeds and documents which he was by the order ordered to deliver, and which were in the possession of *William Hichens* and *William Hichens* the younger, who claimed to have a lien thereon for certain costs due to them from *Henry Francis*, and for monies advanced by them to him.

William Hichens acted as solicitor in putting in the answer of *Henry Francis* and *Absalom Francis*, wherein they made the above-mentioned admissions.

The surviving Plaintiff then presented the present petition, praying that *William Hichens* and *William Hichens* the younger might be ordered to deliver to Mr. *Humphreys* and the Railway Company respectively, the conveyances and the several deeds and documents which by the order of the 14th of *June* 1851, *Henry Francis* was ordered to deliver to them respectively.

The petition came on to be heard on the 17th of *January* 1852, before Vice-Chancellor *Parker*, who being of opinion that the Petitioners had no lien on the deeds and conveyances in the petition mentioned, as
 against

1852.

 FRANCIS
 v.
 FRANCIS.

against the Plaintiff and the Defendant *Alice Francis*, ordered that Messrs. *Hichens* should within fourteen days after service of the order produce and leave in the office of the Master upon oath all the conveyances and deeds, papers, and writings in their custody or power relating to the premises in the petition mentioned, and that when the same should have been deposited as aforesaid. It was ordered that the Master should deliver out to the *Chester and Holyhead* Railway Company the conveyance of the hereditaments purchased by them, and any papers or writings relating to such conveyance, and also deliver out to Mr. *Humphreys* the conveyance and all other deeds, papers, and writings relating to the hereditaments purchased by him as in the petition mentioned, but the said order was to be without prejudice to any proceedings which Messrs. *Hichens* might take to enforce their alleged lien within six months from that time.

From this order Messrs. *Hichens* appealed.

Mr. *Russell* and Mr. *Collins* in support of the appeal.

The Court had no jurisdiction to make the order applied for upon a petition. The only cases in which such a jurisdiction has been exercised are *Bell v. Taylor* (a) and *Rider v. Jones* (b). The former of these reports is only *ex relatione*, and it does not appear that the question of jurisdiction was raised.

[*The* LORD JUSTICE KNIGHT BRUCE.—According to my recollection *Bell v. Taylor* is not incorrectly reported.]

In *Rider v. Jones* there was direct acquiescence on the part of the solicitor in the exercise of the jurisdiction. Neither of these cases can therefore be said to affect the question

(a) 8 *Sim.* 216 ; and see *Warburton v. Edge*, 9 *Sim.* 508.

(b) 2 *Y. & C. C. C.* 329.

question of jurisdiction. And we submit that such an order in a contested case would be unprecedented.

If however the Court has jurisdiction, this is not a proper case for its exercise, for the Defendants *Henry Francis* and his mother *Alice Francis*, another Defendant, have a beneficial interest in the money advanced on mortgage, and the Appellants acted as their solicitors, and have a lien as against their beneficial interest, more especially as part of the sums advanced by the Appellants were so advanced to enable Mrs. *Francis* to purchase necessities for the maintenance of the Plaintiff himself during his minority: *Marlow v. Pitfield* (a).

1852.
FRANCIS
v.
FRANCIS.

The LORD JUSTICE KNIGHT BRUCE inquired whether the Respondent and his mother would consent to an order that, as to a sufficient portion of the fund in court, no transfer should be made without notice to the solicitors, and would consent also to a declaration that this portion should be liable to a lien to the amount (if any) to which there was a lien available against the mother and the son, with a reference to the Master to ascertain the amount.

Mr. *Wigram* and Mr. *J. V. Prior* for the Respondents, said that the mother and son were ready to give this consent. They were not called upon further to address the Court.

The LORD JUSTICE KNIGHT BRUCE.

When a solicitor has received documents belonging to his client, a jurisdiction of a summary nature attaches under which possession of them may be recovered. As they cannot be taken from him without doing justice, it follows that in this summary jurisdiction an investigation may be made into the grounds on which he holds them, and that provision must be made for satisfying his claim

(a) 1 P. W. 558.

1852.
FRANCIS
v.
FRANCIS.

claim (if any). This has been the settled course of the Court for years. Suppose the solicitor of C., a trustee, to receive documents belonging to the trust, knowing them to belong to the trust. The solicitor incurs, in that transaction, an immediate liability to those for whom C. was a trustee, and, with that liability, a liability also, generally, to the same remedies, for the purpose of recovering possession of the deeds, as C. himself is liable to. That is the general rule, which, however, may be liable to exception under particular circumstances. Now, the first question here is, whether the solicitors ought to be taken to have received the documents with notice of the purpose for which *Henry Francis* held them. They were his solicitors, and have been so in this cause. They state that they received the documents as his solicitors, he being only a mortgagee, and for the purpose of this jurisdiction it ought, I think, to be inferred that they received the documents with notice of the nature of the title.

That disposes of the question of the necessity of instituting another suit or claim. The utmost demand of the Appellants is under 500*l*. There is a fund in Court greatly exceeding that amount, which belongs to Mrs. *Francis* and her son, now of age, subject to the completion of a purchase; that purchase will be completed when the documents shall have been delivered. There is, therefore, ample security; and they are willing to submit to an order that a sufficient amount of the fund shall not be transferred without notice to the solicitors, and to a declaration that the amount of the fund is liable to make good such an amount of lien (if any) as is available against the mother and son, or either of them, and to a reference to the Master as to the *quantum*. We think that an order to that effect should be made.

The LORD JUSTICE LORD CRANWORTH concurred.

1852.

Between RALPH RICHARDSON, Plaintiff,
and
JOHN PRYS EYTON, EDWARD EYTON, JAMES
EYTON, SIR WILLIAM LEWIS SALISBURY
TRELAWNEY, HUGH ROBERTS, RALPH
RICHARDSON the Son, MARY LOUISA RICH-
ARDSON, HELENA RICHARDSON, and JOHN
BILLINGSLEY RICHARDSON, Defendants,
By Bill,

AND

Between RALPH RICHARDSON, Plaintiff,
and
JOHN PRYS EYTON, EDWARD EYTON, and
JAMES EYTON, Defendants,
By Claim.

March 24.
April 2.

THE former of the above suits was instituted by a
tenant for life of coal mines, under a field called
Coitia Nicholas, near *Mold*, in *Flintshire*, against the

Before *The*
LORDS Jus-
TICES.

A tenant for
life of a coal-
mine filed a
bill, setting

out documents which shewed this to be the state of his title, but by mistake
alleging that he was tenant in tail. The prayer of the bill was to restrain
the lessees of a conterminous mine from trespassing upon his mine, and to
obtain an account and payment of the proceeds of their alleged wrongful
workings in it. After an interim order was obtained the suit was compromised
in October under an agreement, whereby the Defendants were to pay the
Plaintiff 400*l.*, which he agreed to accept for the full value of all coals to be
raised from the mine in question, with costs to be taxed in the then next Michael-
mas Term, and if reasonable security to the Plaintiffs' satisfaction were given
six months were to be allowed for the payment. *Held*,

1. That the erroneous allegation of title in the bill could not be regarded
as having led to such a misapprehension of it, as would prevent a Court of
Equity from enforcing the agreement for compromise.
2. That under the agreement the Defendants were not entitled to have the
Plaintiffs' title deduced and verified.
3. That the compromise could not be enforced by petition in the original suit,
but that a new suit was properly instituted for this purpose.


1852.
RICHARDSON
v.
EYTON.

lessces of adjoining mines, complaining that the latter had trespassed upon his mine, and got coal from it, and praying for an injunction.

The bill, after deducing the title of a testator named *Richardson* to eleven-twelfths of the mine in question, stated fully the will of the testator, whereby he gave to his wife and *Hugh Roberts*, their heirs, executors, administrators, and assigns, all his real and personal estate and property of every kind upon trust to receive the rents, issues, and profits, and place the same at interest, in order that the same might accumulate, and to stand possessed of all such accumulated property in trust for his nephew, the Plaintiff, *Ralph Richardson*, until he should attain the age of twenty-one years, and then upon trust to pay and apply the interest, dividends, and proceeds of such accumulated property in such manner as thereafter particularly mentioned; and he gave all his real estate whatsoever and wheresoever to the use and behoof of the Plaintiff, for his natural life, accountable, nevertheless, for waste; and, from and after the determination of that estate by forfeiture or otherwise in his lifetime, to the use of the testator's widow and *Hugh Roberts*, and their heirs, during the life of the Plaintiff, in trust to preserve the contingent uses thereafter limited; and, after the decease of the Plaintiff, to the use of the first and every other son of the body of the Plaintiff, and the heirs male of the body of such first and other sons successively, one after the other, in tail male, with a charge for portions for younger children of the Plaintiff. And the testator authorized and empowered his trustees to purchase the remaining undivided twelfth part or share of and in the estate. This power they exercised shortly after his death,

The bill stated that the Plaintiff had long since attained

tained the age of twenty-one years, and had issue of his marriage the Defendants *Ralph, Mary, Louisa, Helena, and John Billingsley*, and no others; that the hereditaments, eleven-twelfths whereof were bought by the testator, and the remaining one-twelfth whereof were purchased after his decease, consisted of the mines and minerals in question, but that the testator had no interest in the surface of the lands under which the mines and minerals were. The bill further stated that the property in the mines and minerals had always devolved and passed consistently with the title thereinbefore set forth, and that the Plaintiff was and continued to be the tenant in tail of all the mines and minerals under the piece or parcel of land called *Coitia Nicholas*. (This, however, appeared to be a clerical error in the bill, as in the corresponding interrogatory the words were "tenant for life.") The bill further stated that the Defendants were lessees of lands adjoining to the close called *Coitia Nicholas*, and had caused a pit to be sunk called the *Mill Pit*, in the land so leased; that, after some negotiation, the Plaintiff's agent, on the 14th of *September* 1849, wrote and sent a letter to one of the Defendants, stating the Plaintiff's willingness to dispose of certain described seams of coal below the *Red Bar*, in the field called *Coitia Nicholas*, for sums amounting to 336*l.* 7*s.* 6*d.*, but so that the sale of these coals should not prejudice the working of such other beds as might be in the ground, but that he strictly forbade any working going on in the ground while this settlement was pending. The bill also stated that, some time in *August* or *September* 1849, a clerk of one of the Defendants called at the office of the Plaintiff's solicitors, and said the Defendants would like to purchase the minerals under *Coitia Nicholas*, and asked to see the Plaintiff's title, to which the Plaintiff's solicitor replied that he had received no instructions in the matter, but that, if the Plaintiff agreed to sell, the Defendants

1852.

 RICHARDSON
 v.
 EYTON.

1852.
 RICHARDSON
 v.
 EYTON.

would be furnished with an abstract, in the usual manner. That, sometime in *October* 1849, one of the Defendants told the Plaintiff's solicitor that the only reason why they had not come to some arrangement was, because he understood that Sir *William Lewis Salisbury Trelawney's* solicitors considered that the minerals belonged to Sir *William*, and that it was then proposed that the Defendants should pay the gross value of the minerals, when the amount should be ascertained, into some bank, in the joint names of the solicitors of Sir *W. Trelawney* and of the Plaintiff, who could afterwards compare the titles of their respective clients, and settle the ownership amicably. The bill charged that the Defendants sometimes pretended that Sir *William Trelawney* claimed and had an interest in the minerals so raised from under *Coitia Nicholas* aforesaid, and that he was a necessary party to the suit, whereas the Plaintiff charged that the Plaintiff was entitled to the minerals under *Coitia Nicholas*, and not Sir *William Trelawney*. The bill also charged that the Defendants, *Hugh Roberts, Ralph Richardson*, the eldest son of the Plaintiff, *Mary Louisa Richardson, Helena Richardson, John Billingsley Richardson*, and Sir *William Lewis Salisbury Trelawney*, ought to set forth what interest they claimed in the matters therein mentioned, and that it was sometimes alleged that the Plaintiff was only entitled in the produce and value of the coal raised from *Coitia Nicholas* aforesaid, and that the value thereof ought to be invested. And it charged that, unless the relief thereby prayed was granted, irreparable mischief would happen to the Plaintiff and those interested in the matters aforesaid.

The prayer was for an account of the coals raised by or by the order of *John Prys Eyton, Edward Eyton*, and *James Eyton*, or either of them, from under the field
 called

called *Coitia Nicholas*, and that it might be declared that the Petitioner was entitled to the full value of all coals so raised, and that *John Prys Eyton*, *Edward Eyton*, and *James Eyton* might be decreed to be liable for such coals, and be ordered to pay what should be ascertained to be the full and utmost value thereof, as well as to make good all damage done by them or either of them, or their or either of their agents, to the coal and minerals under the field, and that the same Defendants might be restrained by injunction from continuing their works under the field, and from getting or raising any coals therefrom, and that the Plaintiff and his agents might be at liberty to view and inspect the workings and coals under *Coitia Nicholas*.

1852.

 RICHARDSON
 v.
 EYTON

All the Defendants appeared to the bill, but had not put in any answer. After an interim order had been obtained, and had been from time to time continued, Mr. *Williams*, the solicitor of the Defendants, met the solicitor of the Plaintiff at *Mold*, and the following agreement was signed by them:—

“In Chancery.

“*Richardson and Others v. Eyton and Others.*

“It is agreed that this suit be compromised on the following terms:—The Defendants, Messrs. *Eyton*, to pay the Plaintiff, *Richardson*, 400*l.*, which he, the Plaintiff, agrees to accept for the full value of all coals to be raised below the *Red Bar* in *Coitia Nicholas*, or *Coitia Tany-ty*, or by what other name the close may be called, with costs of suit, to be taxed next Michaelmas Term, as between solicitor and client. The Plaintiff to execute a release, if required. If reasonable security be given to the satisfaction of the Plaintiff, six months’ time from the date hereof, for the payment of 400*l.*

1852.
 RICHARDSON
 v.
 EYTON.

and costs, will be given. *Mold, 11th October 1850.*
John Williams, Solicitor for the Defendants *Eyton*.
A. T. Roberts, Solicitor for Plaintiff.”


In *November* 1850, the Plaintiff presented a petition, praying that it might be referred to the Taxing Master to tax the Petitioner's costs of the suit, including the costs of that application, and incidental thereto, as between solicitor and client; and that the Defendants, *John Prys Eyton*, *Edward Eyton*, and *James Eyton* might, after the Master should have certified the amount thereof, be ordered to pay the same, and also the sum of 400*l.* to the Petitioner.

On the petition coming on in *December* 1850, *John Prys Eyton*, *Edward Eyton*, and *James Eyton* appeared, and by their counsel objected to the Court making any order on petition for the specific performance of the agreement.

The petition was thereupon directed to stand over, with liberty for the Plaintiff to take such proceedings, by claim or otherwise, as he might be advised.

On the 20th of *December* 1850, the Plaintiff instituted the second of the above suits, by filing a special claim against *John Prys Eyton*, *Edward Eyton*, and *James Eyton*, setting forth the agreement for compromise, and claiming that the petition might come on to be heard, together with the claim, and that it might be referred to the Taxing Master to tax the Petitioner's costs of the suit, as between solicitor and client; and that the Defendants, *John Prys Eyton*, *Edward Eyton*, and *James Eyton*, might be ordered to pay

pay the same, and also the sum of 400*l.* to the Plaintiff; and that the Defendants, *John Prys Eyton*, *Edward Eyton*, and *James Eyton*, might pay the costs of the claim, the Petitioner thereby offering to execute a release when required so to do.

1852.

 RICHARDSON
 v.
 EYTON.


The claim was supported by affidavits of the above-mentioned facts. In opposition to it affidavits were also filed, and in one of them Mr. *Williams* deposed that he had considered and treated the agreement for a compromise, as one which would carry out the original proposal of 1849, under which a title was to be deduced to the minerals.

On the 18th of *December* 1851, the petition and claim came on to be heard before Vice-Chancellor *Turner*, who held that the mistake in the statement of the Plaintiff's title and the affidavit of Mr. *Williams* showed that the agreement for compromise had been entered into under mistake and misapprehension of such a kind as to prevent a Court of Equity from decreeing a specific performance. His Honor dismissed the petition and claim, but, as against the Defendant in the second mentioned cause, without costs.

Against this decision the Plaintiff appealed.

Mr. *Rolt* and Mr. *Giffard*, in support of the appeal.

If the mistake in the bill had been considered likely to influence his Honor's decision, it could have easily been shown, as it now manifestly appears, that this mistake is a mere clerical error. The interrogating part of the bill, and the affidavit, which was an echo of the bill, and was filed when the interim order was obtained, are free from the error, which thus clearly appears to have been

1852.

 RICHARDSON
 v.
 EYTON.

been a clerical one only. The deduction of the Plaintiff's title in the bill itself shows accurately the state of it, and must have prevented the Defendants from being misled by the mistake. The real question between the parties in the second suit was, whether the agreement for a compromise was to be contingent upon the Plaintiff's deducing a title in fee simple. This, we contend, and still submit, is not the fair import of the agreement. It would have been in vain to compromise the suit, if the question of title was not compromised also. The time prescribed for the payment shows that there was to be no preliminary investigation of title.

Mr. *C. P. Cooper* and Mr. *W. H. Terrell*, for the Respondents.

It appears from the evidence, that the misstatement did actually lead to misapprehension, and that the agreement was entered into upon an understanding, at all events, on the part of the Defendants' solicitor, that a title to the inheritance was to be deduced. Otherwise, if the Plaintiff died immediately after payment of the 400*l.*, the Defendants would be exposed to a fresh injunction instantly, at the suit of the remainder-man, and would have obtained nothing for their money. Even if this was a mistaken notion on the part of the Defendants, it was not unreasonably formed, and constitutes a sufficient defence to a suit for a specific performance: *Malins v. Freeman* (a); *Mason v. Armitage* (b). Moreover, the agreement is too indefinite in its terms to be enforced. What is the exact meaning of "all coals to be raised below *Red Bar*," or of "a release?" More exact terms are required to constitute an agreement which the Court can enforce: *Price v. Griffiths* (c).


They

(a) 2 *Keen*, 34.

(b) 13 *Ves.* 25.

(c) 1 *De G. Mac. & G.* 80.

They also referred to *Askew v. Millington* (a), with reference to the Defendants' objection to relief being granted upon the petition alone.

1852.

 RICHARDSON
 v.
 EYTON.

Mr. *Giffard*, in reply.

The LORD JUSTICE KNIGHT BRUCE.

The Vice-Chancellor disposed of the case upon the ground that the bill contained an allegation that the Plaintiff was tenant in tail, and his Honor considered the Defendants entitled to the benefit of the assumption that they were misled by this statement. That seems to have been a point to which the attention of the Plaintiff's counsel had not been particularly directed, and which, they say, was not argued so fully as it would have been, if they had considered it likely to affect the mind of the Judge. I am of opinion, that if the matter had been fully, minutely, and clearly presented to the mind of the Vice-Chancellor, he would have thought, as we do, that the precise and accurate statement of the Plaintiff's title in other parts of the bill, showing that Mr. *Richardson* was tenant for life only, enabled the Defendants to correct the accidental and erroneous statement that the Plaintiff was tenant in tail. The interrogating part of the bill indeed shows that the mistaken allegation in the statement was a mere clerical error. I do not, however, lay much or any stress upon the interrogatory, as the statements in other parts of the bill are sufficient to correct the mistake. We consider ourselves as hardly differing from the Vice-Chancellor, as we have had the advantage of having these other parts of the bill fully called to our attention.

With regard to the rest of the case, we have not
 the

(a) 9 *Harc*, 65.

1852.
RICHARDSON
v.
EYTON.

the benefit of the Vice-Chancellor's opinion, because, viewing as he did the consequences of the erroneous allegation in the bill, he did not address his mind to the other parts of the case. It appears that the Plaintiff, stating himself to be tenant for life of coal under land, in the surface of which he had no interest, except a right to sink pits (if he had that right), filed a bill against owners of conterminous mines, complaining that the Defendants had laterally and subterraneously taken his coal, and he prayed for an account, an injunction, and liberty to inspect the Defendants' workings. An interim order was made in the summer, and was afterwards extended till Michaelmas Term.


Thus the matter stood in *October*, when the *London* solicitor for the Defendants met the Plaintiff's country solicitor at *Mold*, not far from the mines, the place of residence of the country solicitor, upon which occasion the agreement in question for a compromise was entered into.


(His Lordship read it.)

Now it is contended that this is a mere agreement to purchase for 400*l.* all coal raised, or to be raised, either for the life of the Plaintiff, or in fee simple. The Defendants decline stating which of the two interpretations they adopt; but say that whichever ought to be adopted, they are entitled to the production of an abstract of the Plaintiff's title. With this contention we do not agree. The Defendants entered into the agreement with full knowledge of the Plaintiff's title, which the pleadings disclosed. They knew that he was tenant for life, and claimed manifestly, as we think, to be no more. The meaning of the agreement therefore was, that he was to receive 400*l.* for all the coal raised already; and that if
any

any more remained to be raised (which was very improbable), the Defendants were to take it so far as the Plaintiff could give it them.—That so far the Plaintiff was to have 400*l.* in full for all coal gotten, or to be gotten, for the time past and to come. The Plaintiff was also to have, by the terms of the compromise, the costs of the suit taxed, as between solicitor and client, in the following Michaelmas Term, that is to say, within a month. It is, however, contended, that all this was to be suspended till an abstract of title should be furnished, and the title investigated in the ordinary way. But the agreement contains a clause which throws light, if any were wanted, upon this part of the case, by providing that, if reasonable security shall be afforded to the Plaintiff's satisfaction, six months' time for payment may be given. This seems inconsistent with the argument that everything was to wait until a title shown, which might involve the lapse of years. The obvious meaning appears to be, that the agreement was to be immediately carried into effect, and that the Defendants were to have what the Plaintiff could give them, and no more. That is our opinion, and we are glad to find that our views do not differ from those of the Vice-Chancellor upon the materials brought under his consideration.

It is said, however, that whatever may be the true construction of this agreement, it is competent for the Defendant in a suit for specific performance to show that his belief or understanding of the terms of it was or might be different from that which the words of themselves import. If the Defendants could satisfy us that this was the case, we might give effect to the argument; but a consideration of the evidence has not convinced us that there was any such mistaken belief, or any such erroneous understanding. We both affirmatively believe the reverse to be the fact. There must be

1852.

 RICHARDSON
 v.
 EYTON.

1852.

 RICHARDSON
 v.
 EYTON.

be a decree for specific performance. The petition in the original cause should be brought on with this appeal. I think that the petition would not of itself have been sufficient, and that a separate suit was requisite to enable the Court to give effect to the agreement.


The LORD JUSTICE LORD CRANWORTH.

I will only add, with reference to one of the last remarks of my learned brother, that not only is the evidence not sufficient to show that Mr. *Williams* was misled, but it is sufficient to show that the Defendants were not misled; for although the affidavits approach this subject, they do not allege such misapprehension on the part of the Defendants.

April 2.

On this day the appeal was again spoken to, together with a petition in the first-mentioned cause, praying that one order might be made on the petition and the claim and motion, and that the order of the 18th of *December* 1851 might be discharged, in so far as it dismissed the petition as against the Defendants, other than and except Sir *William Trelawney*, and in so far as it dismissed the claim, the Petitioners being ready and willing, and thereby offering to act as the Court might direct in respect of the costs of the Plaintiff's trustee and his children, on the original cause being stayed or dismissed, as between the Petitioners and the said last-named Defendants, and that the costs of the said first-mentioned suit might be taxed as between solicitor and client, and that the costs of the second-mentioned suit might be taxed in the ordinary way, as between party and party, and that all such costs, and the sum of 400*l.* in the agreement mentioned, with interest thereon from the 4th of *October* 1850, at 5*l.* per cent., until the day of payment, might be duly paid to the Pctitioner, or as
 he

he should direct, by *John Prys Eyton, Edward Eyton, and James Eyton*, and that on such taxation and payment all proceedings in the first-mentioned suit might be finally stayed.

1852.

 RICHARDSON
 v.
 EYTON.

Upon the Plaintiff undertaking to pay the costs of his trustee and of his children, the order was made as prayed, and it was thereby declared that it should operate as a release to the Defendants, the Messrs. *Eyton*.

Ex parte JAMES EVERS SWINDELL and Others. April 30.

In the Matter of JOHN ROSE SWINDELL, a Lunatic,

and

Ex parte JOHN PEARSALL ORDISH, in the same Matter.

THE former of the above petitions was that of the legal personal representatives of a lunatic, praying that the Master's report might not be confirmed, finding that no sum in respect of rent of a house, forming part of the lunatic's personal estate, had been lost to the estate of the lunatic by the wilful neglect or default of *Edward Ordish*, the late committee, since deceased. The deceased committee had been appointed in 1830 in the place of a former committee, and had continued to employ the same solicitor whom the former had employed, and who had shortly before been bankrupt but had obtained his certificate, and continued to hold several offices which he had previously held. Shortly after the

Before *The*
 LORDS JUSTICES.

Where a committee of the estate of a lunatic permitted the solicitor whom he employed in the lunacy to become tenant of a mansion-house, forming part of the lunatic's estate, and allowed the rent to be in arrear for four years,

none having, in fact, been paid, except by means of a set-off of a smaller sum, being the amount of the solicitor's bill of costs accruing from time to time: *Held*, that the committee was personally liable to make good the deficiency.

1852.

Ex parte
SWINDELL.

committee's appointment a mansion-house and hereditaments, part of the lunatic's estate, became untenanted, and from the situation of the house, and the circumstance of its being a large mansion, there was difficulty in finding a tenant for it. In *October* 1839, the solicitor proposed to the committee to take the house at 132*l.* a year, being the rent paid by the previous tenant, and he entered into possession accordingly, but paid no rent, being employed by the committee in various suits relating to the lunatic's estate. In 1842 the committee discharged the solicitor, and on *February* 11 in that year obtained an order for taxation of his bill of costs, which amounted to 1050*l.* 16*s.* On taxation it was reduced to 604*l.* 14*s.*, but this reduction was stated to have arisen from the loss of books and vouchers of the solicitor in a fire at the Town Hall at *Derby*, where his offices were. The only portion of the amount of the costs which had not been already allowed was 98*l.*, which together with 100*l.* and 79*l.* paid on account were all that could be set off against the arrears of rent. The committee had shortly afterwards himself become lunatic and had since died, and the reference upon which the report was made was directed upon an application for delivery up of the bond entered into by the committee.

The second petition was that of the personal representative of the committee for a confirmation of the report.

Mr. *Rolt* and Mr. *J. V. Prior* supported the former petition.

Mr. *Swanston* and Mr. *Smythe* the latter.

The LORD JUSTICE LORD CRANWORTH.

This is a very distressing case. This committee chose to employ as his solicitor (as he had a right to do) a gentleman who had been but a few months before a bankrupt, and had
re-established

re-established himself. One of the first acts done after that was, that the committee let to the solicitor a house formerly part of the lunatic's estate, at a rent of 132*l.* per annum. This was a very objectionable proceeding. The solicitor continued tenant for four years, and never paid a sixpence of rent. Having been the solicitor to the committee up to nearly the fourth year of his tenancy, or rather to the end of the third year, he was about the third year dismissed, but continued tenant for a year afterwards. The question is, whether there having been no rent received, except certain sums on account of the rent, we can do otherwise than conclude that the rent was lost through the default of the committee in not enforcing payment. The only excuse suggested is, that there were accruing costs due from time to time, constituting a sort of set-off against the payment of rent, and that on this account the committee abstained from proceeding against the tenant. There appear however to be no costs due, except to the amount of 98*l.*, which the lunatic's representatives are willing to allow to be deducted. With this exception, and that of two sums of 100*l.* and 79*l.* paid on account, the whole rent is lost. No other conclusion can be arrived at than that this loss has arisen because the committee was wanting in that vigilance which the Court is entitled to expect, and is bound to require from one holding that fiduciary situation. I am extremely grieved that such is the result at which I am compelled to arrive; but, considering how important it is to watch the conduct of persons undertaking the care of those who, by the visitation of God, are incapable of taking care of themselves, there is no other course to be taken than to charge the estate of the committee with the whole amount of 395*l.*, giving credit for 179*l.*, adding another year's rent, and deducting from it 98*l.*

1852.
Ex parte
 SWINDELL.

The LORD JUSTICE KNIGHT BRUCE concurred.

1852.

May 3, 4. SPARROW v. The OXFORD, WORCESTER, and
WOLVERHAMPTON RAILWAY COMPANY.

Before *The*
LORDS JUSTICES.

THIS was an Appeal from the refusal of a motion for an injunction by Vice-Chancellor *Turner*.

The special Act of a Railway Company incorporated so much of the Lands Clauses Consolidation Act as was not inconsistent with it. It also provided that such parts of the line as passed through a certain specified piece of land should be arched over, so as to afford to the owner a communication between the severed portions: *Held*, that this provision was not inconsistent with and therefore did not exclude the operation of s. 92 of the Lands Clauses Consolidation Act, which provides that no party shall be required to sell part of a manufactory if he shall be able and willing to sell the whole.

The Defendants were a Railway Company, incorporated under an Act enacting (among other things) that the provisions of the Lands Clauses Consolidation Act, 1845, should form part of it, so far as the same were applicable and were not inconsistent with the provisions of the special Act.

On the 25th of *June* 1851, the Defendants gave the Plaintiff notice that they required part of his land for the purposes of their Railway in pursuance of their Act.

Thereupon the Plaintiff informed them that the land required by their notice was part of a manufactory, and that he declined to sell a part of it only, but was able and willing to sell the whole. On the 12th of *August* 1851, the Defendants caused the piece of land required by them to be valued, and delivered to the Plaintiff a bond for 500*l.*, paying a like sum into Court, as directed by the Lands Clauses Consolidation Act, 1845.


The

Land included in the same wall with tin-plate works, and used for the deposit of ashes from the works: *Held*, to be part of a manufactory within the 92nd section of the Lands Clauses Consolidation Act, although the two portions of the property were separated by a road over which a stranger had a right of way.

Where a Company had given notice to take part of a manufactory, and were required to take the whole under the above section: *Held*, that they could not escape from the necessity of so doing by changing their plan, and passing under the part comprised in their notice by a tunnel, whether such a proceeding would amount to taking a part of the manufactory or not.

Semble, that it would amount to taking a part of the manufactory.

The present suit was then instituted to restrain the Company from interfering with the land without taking the whole.

1852.

 SPARROW
v.
 THE OXFORD,
 &c. RAILWAY
 COMPANY.


On the appeal motion coming on, it was arranged that it should stand over in order that the cause might be heard with it upon the affidavits already filed, and others to be filed within a limited time, each party filing his own affidavits without seeing those of his adversary. To save expense and delay their Lordships consented to hear the cause themselves in the first instance. The cause now came on to be heard accordingly. Among the additional evidence were affidavits on the part of the Defendants that they could and were prepared and intended to carry the part of their line which traversed the land comprised in their notice through a tunnel, so as to avoid in any manner disturbing or interfering with the Plaintiff's works or manufactory.

The other facts of the case, as well as the material provisions of the special Act, will be found in the report in the Court below (*a*), and their Lordships' judgments.

Sir *W. P. Wood*, Mr. *Malins*, Mr. *Shapter*, and Mr. *Gray*, for the Plaintiff.

First, The time for exercising the parliamentary powers has expired. And although it may have been recently held that a notice on the part of the Company is such a contract as will prevent the time from running, yet here assuming a contract, to have been entered into by the notice, the Plaintiff's counter-notice rendered it a mere conditional contract, and the election of the Defendants not to comply with the counter-notice determined the contract created by the original notice, so that there

(*a*) 9 *Hare*, 436.

1852.

 SPARROW
 v.
 THE OXFORD,
 &c. RAILWAY
 COMPANY.

there was really no binding contract when the time expired, which distinguishes this case from those cited below.

Secondly, If this should be otherwise held, the Defendants cannot take part of the land without the rest, for it is all one manufactory, and it is not necessary for this purpose that it should consist entirely of buildings : *Barker v. North Staffordshire Railway Company* (a). It was all within one wall when the Act passed, and was used for purposes connected with the Plaintiff's works. And it is now covered with buildings, and was so when the notice was given, which is the proper time for ascertaining whether it came within the word "manufactory." With regard to the new case now for the first time made as to making the line in a tunnel, we reserve our answer to it till it is brought forward in argument.

They also cited *Reg. v. London and South-Western Railway Company* (b), and *Reg. v. London and Greenwich Railway Company* (c).

The LORD JUSTICE KNIGHT BRUCE referred to *Taylor v. Clemson* (d).

Mr. Bethell, Mr. Rolt, Mr. Willes, and Mr. W. Bovill, for the Defendants.

As to the expiration of the time, that question is set at rest by the recent decisions at law.

With regard to the other part of the argument, it depends entirely on the question whether the 92nd section of the Lands Clauses Consolidation Act is incorporated into

(a) 2 *De G. & S.* 55.


(b) 12 *Q. B.* 775.

(c) 2 *Gale & D.* 444.

(d) 3 *Railw. Ca.* 90; 2 *Q. B.*

978; 11 *Cl. & Fin.* 610.

into the special Act. Now by the terms of the latter this will not be the case if there is any inconsistency between its provisions and those of the 92nd section of the general Act. On looking at the special Act the utmost inconsistency appears.

1852.

 SPARROW
 v.
 THE OXFORD,
 & C. RAILWAY
 COMPANY.

[They proceeded minutely to discuss the clauses referred to, and they also referred to a petition which the Plaintiffs had presented to the House of Lords against the Bill, urging that if passed as then framed it would exclude the petitioners from the benefit of the 92nd section of the Lands Clauses Consolidation Act; but these parts of their argument are so fully stated in the judgment that it is unnecessary here to state them in any greater detail.]

Even granting that the 92nd section might apply, still the piece of land in question cannot be regarded as having been part of the manufactory when the special Act passed. It was not built upon, and was separated from the buildings of which the manufactory consisted by a road, over which strangers had a right of passing, and it is not pretended that any kind of manufacture was produced upon it when the Act passed. This being so, it was not within the power of the Plaintiffs by proceedings, *ex post facto*, to bring it within the provisions of the Act. They could not change the nature of the property to the prejudice of the Company.

[*The LORD JUSTICE KNIGHT BRUCE.*—Is it not a serious proposition that a man cannot deal with his property at his pleasure after the passing of the Act?]

His ownership is, during the period for which the compulsory powers of such Acts are in force, considerably modified by those powers. He may perhaps, if he con-

1852.


 SPARROW

v.

THE OXFORD,
&C. RAILWAY
COMPANY.

templates changing the nature of the property and founding a claim upon that change, acquire some equity by requiring the Company to exercise within a reasonable time the option which the legislature has given them. But nothing of the kind was done here. He cannot after the passing of such an Act make a house over part of the line, and say that it is a house within the meaning of the Act. He cannot take away any power from the Company which their Act gives them.

But the whole difficulty is avoided by the course now proposed to be taken. By carrying the line through a tunnel no part of the manufactory will be taken. Although the tunnel may be part of the land, it can be no part of the manufactory. It could at the utmost "injuriously affect" the manufactory. Now although there are several provisions of the general Act applicable to cases where property is not taken, but is only "injuriously affected," still such cases are not within the 92nd section, which is confined to those in which the property is actually taken.

Sir *W. P. Wood* was not called upon to reply.

The LORD JUSTICE LORD CRANWORTH :

We do not think it necessary to delay giving judgment in this case, the principal questions argued having been under our consideration on the former discussions, and being therefore not new to us. The bill was filed on the 10th of *September* 1852. Its object was to obtain an injunction, restraining the Defendants, the *Oxford, Worcester, and Wolverhampton* Railway Company from entering upon or taking possession of certain pieces of land required by them, in a notice which they gave on the 25th *June* 1851, and from proceeding to take measures to acquire these pieces of land by compulsory

pulsory purchase. The Plaintiffs are owners or parties interested in a large tin-plate manufactory at *Wolverhampton*, and it appears that one of them had purchased the manufactory from a person of the name of *Henderson*, about three or four years ago, shortly before the time when the *Oxford, Worcester, and Wolverhampton Railway* (Deviation) Act, 11 & 12 *Vict.* c. 133 obtained the royal assent, as it did, on the 14th of *August* 1848,

1852.

 SPARROW
 v.
 THE OXFORD,
 &c. RAILWAY
 COMPANY.

Soon after the purchase, the land having been left, as I collect, in rather a dilapidated state, the Plaintiffs improved it, and added some buildings, which are situate upon the line of the projected railway. The Company took no steps with reference to the land which they required for this portion of their intended line, until the 25th of *June* 1851, nearly three years after the royal assent was given to their bill, and almost at the expiration of the time during which they had a power by compulsory process of taking land. On the 25th of *June* 1851, they gave notice to the Plaintiffs, in the form prescribed by the *Lands Clauses Consolidation Act*, that their railway would pass through the Plaintiffs' lands, and that 19½ perches would be required by the Company; that it was their intention to take the same, and contract for it; and they thereby offered to contract for the purchase of the Plaintiffs' interest therein, and for compensation for consequential damages. The Plaintiffs, upon the receipt of that notice from the Company, delivered a counter-notice, claiming that if the Company took the piece of land which they proposed to take, (and which constituted a small portion only of what I will at present call their manufactory,) then they would require the Company to take the whole of the same manufactory; and they stated themselves to be willing to sell and convey the whole of the manufactory to the Company; and they claimed in respect thereof and for compensation

1852.
SPARROW
v.
THE OXFORD,
& C. RAILWAY
COMPANY.

and damages 60,000*l.*, exclusive of any claim of a person named *Henry Crane*, in respect of a grant to him by the Plaintiffs of a right to use a certain road, forming part of the manufactory. This notice, they contend, was justified by the 92nd section of the Lands Clauses Consolidation Act 1849, providing that no person shall be required to sell or convey a part only of any house or other building or manufactory, if such person be willing and able to sell and convey the whole thereof. The Company disputed their obligation to take the whole, and contended that they were entitled to take a part only, which was included in their notice, namely, about 19 perches.

In this state of things, on the 10th *September* 1851, the Plaintiffs filed their bill for an injunction to restrain the Defendants (the Company) from proceeding to take a part without taking the whole. An application was made, shortly after the bill was filed, to Sir *George Turner*, to obtain an interim injunction; but his Honor did not grant that injunction, thinking that the 92nd section of the Lands Clauses Consolidation Act 1845, was not incorporated with the Company's Act. There were also other grounds upon which he refused the injunction.


The Plaintiffs appealed, and the case was argued before us at considerable length in the month of *February* last. At that time all we had to decide was, whether a sufficient case was established to make it expedient that, until the cause could be heard, the Defendants should be restrained from doing what they were proposing to do, and that the matter should be left in *statu quo* till the cause was heard. We thought that such a *primâ facie* case was made out, and we granted an interim injunction; and at the same time,
upon

upon the application of the parties, we gave them facilities for having the cause heard speedily, both sides agreeing that, instead of examining witnesses, each party should make what affidavits he thought fit, and that those affidavits should be treated as evidence in the cause, so that the cause might be set down speedily to be heard before us.

1852.
SPARROW
v.
THE OXFORD,
&c. RAILWAY
COMPANY.

This was accordingly done, and the question is whether or not the Plaintiffs have now on the hearing entitled themselves to the relief which they ask. There were two main questions for consideration; one a question of fact, the other a question of law. The question of fact was, whether that which the Defendants proposed to take did, within the meaning of the Act, constitute a part of the manufactory. The question of law was, supposing the land to constitute part of the manufactory, were the Defendants enabled to take it without taking the whole?

The question of fact ought, perhaps, in strictness to be described as a mixed question of law and fact. What the Defendants proposed to take was a certain piece of land, which, at the time the Act passed, was not covered with buildings though it was within the wall of that which is called the manufactory. Soon after the passing of the Act (the Plaintiffs having made their purchase just before the Act passed) considerable additional buildings were put upon that piece of land, the greater portion of which was vacant at the time the Act passed. There can be no doubt but that these additional buildings constitute part of the manufactory in the strictest sense. But then it was contended that what was to be looked at was, not the state of matters when the Company proceeded to take the land, but the state of the property at the time when they gave the notice; and it was said, that at that time those buildings did not exist; that at that time it was
vacant

1852.

 SPARROW
 v.
 THE OXFORD,
 &c. RAILWAY
 COMPANY.


vacant ground—within the wall, it is true, of the manufactory—but not having any manufacturing process carried on upon it, and therefore not constituting, within the meaning of the Act, part of the manufactory.

We do not think it necessary to decide the question, whether the state of the property at the time the Act passed, or its state at the time when the land was taken by the Company, is to be regarded. We do not consider it necessary to discuss that question, because we are both of opinion that this was part of the manufactory at the time when the Act received the royal assent. In such questions there may be nice distinctions; and it may be difficult sometimes to say on which side of the line a particular piece of land or a particular building lies. But we do not feel ourselves driven to any refined distinction in this case; because, looking at the model before us, which we assume to be an accurate representation, there seems to be very little of vacant space within the wall. I can easily believe what one or two of the witnesses say, viz. that they were always pressed for room, in order to have a place where they might deposit their rubbish and the scorix that came from the furnaces. The manufactory could not go on without that, any more than it could go on without the furnace itself. The piece of ground proposed to be taken was absolutely necessary as a place for the deposit of rubbish and scorix, and it seems to me, and to my learned brother, to be clear that, in this case, everything included within the wall constituted at the time of the passing of the Act part of the manufactory.

This disposes of the question of fact in favour of the Plaintiffs; and then arises the question of law, that is, assuming that the land proposed to be taken constitutes part of the manufactory, are the Defendants, or are they
 not

not, bound to take the whole of the manufactory? That depends upon the question of law whether or not the 92nd section of the Lands Clauses Consolidation Act was or was not, expressly or impliedly, incorporated into the special Act (11 & 12 *Vict.* c. 133). Now, the second clause of the special Act says, "Be it enacted, that the provisions of the Lands Clauses Consolidation Act 1845, shall, so far as the same are applicable and are not inconsistent with the provisions hereinafter contained, be incorporated with and form part of this Act." What was contended was, that the 92nd section was inconsistent with the provisions thereafter contained; and it is upon that point that we have had the greatest pressure upon our minds, because it appears to have been the opinion of a Judge of the highest eminence, and for whom we both, and all the profession, feel the most profound respect, that the 92nd section was not incorporated in the special Act. Therefore we have felt very diffident as to the view which we have taken. But, with all respect for that opinion, we have come to the conclusion that there was nothing in any of the subsequent provisions inconsistent with the notion of the 92nd section being incorporated in that Act.

I will proceed shortly to consider what are the grounds on which it was contended here, and before the Vice-Chancellor, that the 92nd section is inconsistent with the special Act. They all appear to involve the assumption that the 92nd section is imperative, so that in all cases the Company must take the whole manufactory, if they take part of it. But, according to the 92nd section, they need only take it if the other party requires it to be taken. It would have been the height of injustice to enact that in all cases they must take it *in invitum*. The owners of the manufactory might say in many cases, "It is quite immaterial whether

1852.

 SPARROW
 v.
 THE OXFORD.
 &c. RAILWAY
 COMPANY.

1852.
SPARROW
v.
THE OXFORD,
&c. RAILWAY
COMPANY.

whether you take the whole or not." In such cases the Company are not bound to take the whole. It seems to me, that the whole argument on the part of the Defendants has proceeded on this fallacy; for when one looks at the different arguments which have been deduced from the 12th, 13th, and 14th sections of the special Act, and considers at the same time the 92nd section of the general Act as providing, not that, under all circumstances, the land must be taken, but only that it must be taken if the owner of the manufactory requires it to be taken, all the difficulty seems to vanish, as will appear when we consider these arguments in detail.

The 13th section, which was mainly relied on, has enactments to this effect. It appears that a gentleman of the name of *Crane* was the owner of land adjoining to this manufactory, and that by arrangement between the Plaintiffs and Mr. *Crane*, for their common convenience, there was to be a side line or private railway, that was to run on for a considerable way down to the west, so as to join not this railway, but the *Stour Valley* Railway. The 13th section enacted, that such part of the railway, by that Act authorized to be made, as should pass through any of the several plots, pieces, or parcels of land in the parish of *Wolverhampton*, &c., numbered 159, 160, 161, and 162, on the plan, and so much of the piece of land numbered 158, as was therein after defined (that is, those pieces of land, for which this side line or private railway, was to be formed,) should be arched or covered over; and that such arching or covering should be continued in such manner and of such strength as should make it sufficient to bear and carry over and upon the same a branch railway, or branch railways to be worked by horse power; and in case the owner or owners for the time being, and other parties interested in the said plots, pieces, or parcels of

of

of land, and the said Company, should differ as to the manner of constructing, or as to the strength of such arching or covering, the same should be settled by arbitration, in manner prescribed by the Railways Clauses Consolidation Act 1845, with respect to the settlement of disputes by arbitration. Now the argument was, that that provision is inconsistent with the notion that the Company should take the whole of the manufactory, because in that case the side railway would in truth be their own railway, and they might deal with it as they thought fit. But there are two answers to that argument; first, that the Railway Company might not be called upon to take the whole manufactory, in which case this provision would secure to the Plaintiffs the benefit proposed; and secondly, that this side line or private railway was not for the exclusive benefit of the Plaintiffs, one other proprietor at least, namely, Mr. *Crane*, being interested in it. Whether any other persons were or were not, is immaterial, because the provision in the 13th section was absolutely necessary to secure Mr. *Crane's* rights. Therefore it seems to me that there is nothing whatever inconsistent with the 13th section of the special Act in supposing that the 92nd section of the general Act was to have its full operation.

With regard to the 14th section, it is thereby enacted, "that the owner or owners for the time being of the said several plots, pieces or parcels of land, lastly hereinbefore mentioned, and all other persons interested therein, shall have and enjoy the same powers, rights, privileges, easements, and authorities over, above, and upon the upper surface of the said arching or covering, including the power of making, maintaining, and working the said branch railway or railways, to be worked by horse power as aforesaid, over and upon the said arching or covering, as the said owner or owners, or other persons, now have
and

1852.
SPARROW
v.
THE OXFORD,
&c. RAILWAY
COMPANY.


1852.
SPARROW
v.
THE OXFORD,
&C. RAILWAY
COMPANY.


and enjoy, in, upon, and over the said several plots.”
“Provided always, that the said owner or owners, or other persons, shall not be at liberty to erect upon the said arching or covering any buildings, without the consent in writing of the said Company.” Now it is argued that this 14th section shows it to be impossible to consider the 92nd section of the general Act incorporated into the special Act for this reason. The private railway, it is said, would run over the Company’s railway; and therefore the Company were interested in seeing that nothing should be done to damage them. But, it is asked, why stipulate for that, if the Company itself is to become the proprietor of the manufactory, as an adjunct to which the private railway is to be erected? The same answer applies to this as to the argument on the 13th section. It is true that the Company may become the proprietors of the private railway, and in that case this clause would become superfluous. But in the event of their not being required to take the whole manufactory, then such a stipulation is necessary.

Then again Mr. *Willes* has particularly directed our attention to the 12th section, which he says is inconsistent with the notion that the 92nd section of the general Act was part of this Act. The 12th section relates to certain properties, numbered respectively 90, 91, 130, 131, and 140 (being, as I will assume for the present, all of them either houses or manufactories, or something that would come within the scope of section 92 of the general Act). It enacts, that the Company shall and they are thereby required to purchase all these properties, being all included within the line of deviation, but not, apparently, according to the parliamentary plan properties that would be taken, unless there should be a deviation from the intended line of railway. It is asked, for what purpose was it necessary to enact that these particular
manufactories

manufactories should be taken, when the 92nd section, if incorporated into the Act, would have effected all that was required? The answer is, that the 92nd section only gives authority to the owner of a manufactory to insist upon the whole being taken, if any part is taken; whereas this enactment positively stipulates that the whole of the properties numbered 90, 91, 130, 131, and 140 shall be taken. It is obvious, on looking at the plan, that as to a large portion of this property, the stipulation must have been introduced to prevent opposition on the part of the owners of these properties, because they cannot all be used for the purpose of the railway. They are all out of the line that was contemplated, though within the line of deviation. It is sufficient for the purposes of the present argument to say, that it is a perfectly different enactment from the 92nd section of the general Act, which does not say that you shall take every manufactory that is within your line of deviation; but only that if you take a part of the manufactory, you shall, if the owner wishes it, take the whole of the manufactory. What is enacted by this 12th section is different; namely, that with regard to several manufactories within the line of deviation, but not probably in the line that will be touched by the railway, you shall take and pay for those, whether you use them or not. This therefore also wholly fails, as a reason for inducing us to suppose that the 92nd section is inconsistent with the provisions of this Act.

Another argument was pressed upon us, but I thought at the time that it was unfounded. It seems that the Plaintiffs petitioned the House of Lords, that, notwithstanding the introduction of the clause as to the private railway, the bill might not pass into a law. It is said that on that occasion they represented that the effect of the clause would be that they could not insist upon the 92nd section.

1852.

 SPARROW
 v.
 THE OXFORD,
 &C. RAILWAY
 COMPANY.

1852.

SPARROW
v.
THE OXFORD,
&c. RAILWAY
COMPANY.

section of the general Act. If they did, we cannot of course be bound by their view of the law, and the circumstance of their opposition is a strong one in their favour on the question of fact, that they never meant to consent to abandon the right to insist upon the whole of the manufactory being taken, if any of it was taken. It seems to me that this circumstance, so far as it has any bearing, is rather in favour of the Plaintiffs than against them.

That being the state of the case, the conclusions at which we have arrived are, that, in point of fact, the property was, at the time when the Company gave the notice, part of the manufactory, and that the 92nd section of the general Act entitles the owners of the remaining part of that manufactory to insist upon the whole being taken.

The only remaining question is one which has been raised now at the hearing for the first time, viz. that although the Company have given a notice, in the ordinary way, that they mean to take the land, they are now entitled, if they cannot take the land, to burrow under it, by making a tunnel which they say they are able and willing to do, without taking or touching any part of the surface. A great number of arguments in support of this view were urged upon us. It was said, Suppose the manufactory was at the top of a hill, and you were burrowing under it at the distance of 1000 feet, are you then taking part of the manufactory? I do not feel myself called upon to answer that question; but if I were, I should incline to the opinion that you are, on the principle of the maxim, "*Cujus est solum ejus est usque ad inferos.*" Can it be said that if you were an inch below the surface, you would not take a part of the manufactory?

manufactory? I am inclined to think that however deep the tunnel was made, it would be within the enactment.

1852.

SPARROW

v.

THE OXFORD,
& C. RAILWAY
COMPANY.

I do not however think that question arises, because here is a notice to take the land; and upon that notice the Company were proceeding to take it in the ordinary way. That is virtually what was contemplated when the notice was given. Moreover they have given a bond, under the 85th section of the Lands Clauses Consolidation Act, and in that bond they have recited, that 150*l.* has been assessed as the value for the purchase in fee-simple of the messuage, tenements, hereditaments, and the several lands mentioned in the notice, and numbered 161, and that 350*l.* has been assessed as the value for severance. It is obvious, that what was meant was, that they were to take the land, and pay 150*l.* for the value of the land and building, and 350*l.* for the inconvenience occasioned by the severance. That is the way in which they put it themselves; and I cannot but come to the conclusion that this scheme of proceeding by a tunnel is a mere afterthought. Under their notice, the Defendants must take the land, or do nothing.

I think, therefore, that the Plaintiffs are entitled to the relief which they ask. The injunction will be made perpetual in the terms in which it was made before, except that there must be an undertaking on the part of the Plaintiffs to make a good title to the land, and to execute a conveyance. I suppose there will be no difficulty about that. If they have not a good title to the manufactory, they cannot be able and willing to convey it.

The LORD JUSTICE KNIGHT BRUCE.

Very few words need be added by me to what has been said. I continue to take a view differing from a
judgment

1852.

SPARROW

v.


THE OXFORD,
& C. RAILWAY
COMPANY.

judgment which I hold in the highest respect and estimation as to the effect of the 12th, 13th, and 14th sections of the special Act. I am of opinion, that the introduction of these sections does not exclude the application or incorporation of the 92nd section of the general Act, and that, upon the undisputed facts of the case, whether the state of the property when the notice of the intention to take it, or its state when the Act was passed, is regarded, the land which the Defendants require is part of the Plaintiffs' manufactory, within the meaning of that section.

Observations were made on the language of the petition, which the Plaintiffs presented to the House of Lords. The allegations in the petition may have been, or may not have been, accurate; but fraud or unfair intention upon the petitioners' part is out of the case; and it is not pretended that they amounted to contract. They might, by possibility, have been so worded as to amount to a representation of fact or intention, from which, if they had induced a particular line of conduct on the part of those to whom they were made, the Plaintiffs would not have been allowed to depart: but I am of opinion that the case cannot be put so high, and that there is no evidence that, by reason of anything stated in the petition, the Company was induced to adopt any line of conduct rendering the Plaintiffs' present contention unfair or inequitable.

With regard to the design now said to be practicable, of carrying the railway under the surface, so as not to disturb or interfere with the Plaintiffs' manufactory, one sufficient answer has been given, independently of others which might be suggested; and it is this, that the notice which the Defendants gave was a notice to purchase merely and absolutely the fee-simple of the land specified

cified in it. The notice (whether it amounts to an actual contract, or to a declaration of intention, forbidden by the law to be departed from, is of no importance) had the effect of a contract, and the effect of giving the Plaintiffs a right to say that the lands mentioned in the contract should not be taken, should not be used, unless upon the terms that if the Plaintiffs desired to sell the whole the Defendants should purchase the whole. From that notice the Defendants are not entitled to recede. Substantially, the decree must be for the Plaintiffs, and I believe that Lord *Cranworth* agrees with me in thinking that the Defendants ought to pay the costs of the suit, including the costs of the original motion for an injunction.

1852.

 SPARROW
 v.
 THE OXFORD,
 &c. RAILWAY
 COMPANY.

JONES v. BATTEN.

Dec. 8.

BY the 6th section of the Act for the Improvement of the Jurisdiction in Equity (15 & 16 *Vict.* c. 86), the Clerk of Records and Writs may receive and file a written copy of (among other bills) a bill for an injunction, on the undertaking of the solicitor to file a printed copy of such bill within fourteen days; and every bill so filed shall be deemed to have been filed at the time of filing the written copy.

Before *The*
 LORDS JUSTICES.

Where a written bill for an injunction has been filed with a proper stamp, the requisite printed copy may be filed without stamp, and both ought to remain on the file.

By the 12th section of the Suitors in Chancery Relief Act (15 & 16 *Vict.* c. 87), it is enacted, that no document which by any Order is required to have a stamp shall be filed unless and until the same shall have a stamp impressed thereon.

By the Order of *October* 25, 1852, art. 6, it is directed that the fees shall be payable which are mentioned

1852.

JONES

v.

BATTEN.

tioned in the second schedule to the Order, by means of stamps. The second schedule has this item :

“ Filing any bill or information . . £1 0 0.”

In this case a written bill for an injunction had been filed with a proper stamp. On the solicitor attending within the fourteen days to file the printed copy, the officer declined to receive it without a stamp.

Application was then made to the Vice-Chancellor *Turner*, that the printed copy might be received without a stamp. His Honor requested that the matter might be mentioned to the Lords Justices.

Mr. *Freeling* now made the application accordingly.

Their Lordships held that the two copies formed but one bill, and that the second or printed copy was not a document required by the Order to be impressed with a stamp.

They were also of opinion that the written bill must remain in the office along with the printed copy, so as to preserve evidence of the actual time of filing it.

1852.

In the Matter of The NORTH OF ENGLAND
JOINT STOCK BANKING COMPANY and of
The JOINT STOCK COMPANIES WINDING-
UP ACTS, 1848 and 1849.

May 8. 31.
June 1.

HOLME'S CASE.

THIS was the renewal, on the part of the Official
Manager of the above Company, of a motion which
had been refused by the Vice-Chancellor *Knight Bruce*,
on the 29th *March* 1851. The object of the original
and present application was to obtain a declaration that
Thomas Holme was liable as a contributory in respect of
forty-eight shares for all losses sustained by the Com-
pany anterior to the 21st *January* 1847, the day on
which he transferred the forty-eight shares to *Mary*
Aitchison.

Before *The*
Lord Chan-
cellor LORD
ST. LEON-
ARDS.

By the terms
of a Joint
Stock Bank-
ing Com-
pany's deed
of settle-
ment, it was,
among other
things, pro-
vided that
nothing in the
deed con-
tained should
release a re-
tiring mem-
ber from his
share of the
losses sus-
tained by the
Company up
to the period
of his retire-
ment, and
also that the
half-yearly
balance

The following facts of the case are extracted from the
judgment of the Master :—

“ *Thomas Holme* signed the deed of settlement in re-
spect of shares amounting to thirty, and subsequently he
acquired eighteen other shares. On the 21st *January*
1847, he transferred these forty-eight shares to *Mary*
Aitchison, having received dividends or profits which
became payable up to that day.

“ The sheets should,
as between

shareholders, be binding and conclusive. A. B., a shareholder, duly transferred his
shares, and the two balance sheets immediately preceding the transfer showed
the affairs of the Company to be in a prosperous condition. Four months
after the transfer the Bank suspended payment, and upwards of three years
after that time an order was obtained for the winding up of the Company.
The person who prepared the balance sheets deposed that there were in fact con-
siderable losses sustained by the Company in the two years preceding the
transfer : Held, nevertheless, and affirming the decisions of the Master and
the Vice-Chancellor, that A. B. was not liable as a contributory.

1852.
 HOLME'S
 CASE.

“The sum of 255*l.* 14*s.* has been paid by *Mary Aitchison* on account of the calls made under this reference, and *Samuel Hedley*, by his affidavit, swears ‘that he has been informed, and he believes that *Mary Aitchison* is totally unable to make any further payment on account of the said calls, or either of them.’ Under these circumstances, the Official Manager applies to include the transferor, *Thomas Holme*, as liable to losses under the provision in the 26th article of the deed, that ‘nothing in this article contained shall extend, or be construed to extend, to release the previous holder of shares, so forfeited or transferred as aforesaid, from his proportion of the losses, if any, sustained by the Company up to the period of his ceasing to be such holder of shares.’ In *Hawthorn’s* case (a), he was included in the list as liable in respect of losses, if any, sustained by the Company, up to the period of his ceasing to be a holder of shares; but in the present case, Mr. *Holme* resists being included at all, upon the ground that, at the time he ceased to be a shareholder, the Company had not incurred any losses, and in support of that proposition he relies upon the reports of the Directors, and mainly upon two balance sheets. One is for the year ending the 31st of *December* 1845, by which it is made to appear that there was profit for that year amounting to 9773*l.* 1*s.* 11*d.*, out of which a half year’s dividends, amounting to 3732*l.* 14*s.* 3*d.*, were paid. The other is for the year ending 31st of *December* 1846, by which it is made to appear that there was profit for that year amounting to 12,421*l.* 10*s.* 4*d.*, out of which a half year’s dividends, amounting also to 3732*l.* 14*l.* 3*d.*, were paid. It is argued on behalf of Mr. *Holme*, that these balance sheets are by the terms of the deed of settlement

conclusive

(a) 1 *Mac. & G.* 49.

1852.
HOLME'S
CASE.

shareholder, not being a Director or Auditor, should be entitled to inspect the books.

By the twenty-second Article it was provided, that the Directors should half-yearly set a value on the shares; that the shareholders might sell or transfer their shares with the consent of the Directors, first offering them to the Company; and that if the Directors refused their consent, they should purchase the same out of the funds of the Company, at the value for the time being set upon them.

By the twenty-sixth Article it was provided, that whenever by any means whatever any shares shall become actually forfeited, or shall be duly and effectually transferred to a new holder, then, and in such case, and not before, the responsibility of the previous holder as a member of the Company in respect of such shares, shall (so far as the law will in that behalf allow) cease and determine, and such previous holder shall be exonerated and released from all subsequent claims, demands, and obligations in respect of the same shares, and from all future observance and performance of the covenants, conditions, stipulations, and agreements in the deed of settlement contained in respect of the same shares, provided, nevertheless, that nothing in this article contained shall extend or be construed to extend to release the previous holder of shares so forfeited from his proportion of the losses, if any, sustained by the Company up to the period of his ceasing to be such holder as aforesaid.

By the thirtieth Article it was provided, that every transfer shall carry with it the profits and interest, and share of capital and surplus, or guarantee fund in respect of the shares transferred, so as to close all the
right

right and interest of the party making such transfer in respect of such transferred shares.

1852
HOLME'S
CASE.

By the forty-fifth Article it was provided, that at every half-yearly general meeting of the Company, the Directors shall exhibit to the shareholders such a balance sheet as they are required to prepare by the sixty-ninth Article, and such a statement of the probable amount of losses to be apprehended from the subsisting accounts and engagements of or with the Company, and generally of the state and progress of the affairs up to the 30th *June* and 31st *December* preceding, as the Directors shall deem expedient for the interest of the Company to be made public, and every such balance sheet shall be binding and conclusive on all the shareholders, their executors, administrators, and assigns, unless some error shall be discovered therein respectively, and in that case such error only shall be rectified.

By the sixty-ninth Article it was provided, that the Directors should cause all necessary books of account to be kept, and cause entries to be made of all receipts, payments, transactions, and dealings, and of all profits and losses arising therefrom, and an account of all dealings and investments with, or of the capital, or of the money deposited with the Company, and should, at least twice in every year, up to 30th *June* and 31st *December*, cause the same books to be settled and balanced, and “ cause to be made out a full, true, and explicit statement and balance sheet, exhibiting the debts and credits of the Company, and the amount and nature of the capital and property thereof, and the then fair value of the same estimated by the Directors as nearly as may be, and to the best of their judgment, and the amount of the Company’s negotiable securities then in circulation, and the profits and losses of the Company, and all other matters and things

~~sary~~ consequence would be, that in the case of every transfer of shares the accounts of the Company would have to be taken. We further submit that there can be no liability to creditors, inasmuch as more than the three years limited by the Act 7 Geo. 4, c. 46, have elapsed between the date of the transfer and the winding up of the Company, and that, so far as the transferee is concerned, there was no guarantee to indemnify him on the part of his transferor, *Dodgson's Case (a)*.

1852:

 HOLME'S
 CASE.

Mr. *Bethell*, in reply, submitted that the present case must be governed by the authority of *Hawthorn's Case (b)*, where a shareholder who had retired was nevertheless held to be liable as a contributory.

The LORD CHANCELLOR.

June 1.

The question here is, whether a person, who has transferred his shares upwards of three years before the stopping of the Company can now be put upon the list of contributories of the Company, regard being had to the provisions of its deed of settlement, and to the state of its affairs, as disclosed by the balance sheet presented to the shareholders of the Company previously to the transfer.

In all these concerns, in which there are necessarily a great many floating balances and open accounts, it is scarcely possible, at any given moment, to ascertain what the actual loss is; and therefore, generally speaking, when a man comes in as a purchaser of an interest in any of such concerns, he takes it just as he finds it, subject to whatever loss or benefit may result; otherwise, were the seller to continue liable for losses up to the time of the sale, unless there was some special provision to meet that exact case, it would be necessary, on every

(a) 3 *De G. & S.* 85.

(b) 1 *Mac. & G.* 49.

1852.
HOLME'S
CASE.

every occasion, to take an account of the actual extent of loss at the time when each particular transfer took place, which would be almost impossible.

It is quite clear that, on a question of this nature, it cannot be maintained that the loss was incurred, as was attempted to be argued, when the debt was incurred—that is, when the loan or advance was made; and if, in the result, the debt has proved a desperate one, that is no reason why it should be considered as a loss at the time that that debt was contracted. The question then is, What is the exact moment at which the loss may be said to have occurred? This Company went on in a way that was sure to lead to ruin, having mere securities upon paper; and when they found that the debtors could not pay, they renewed their bills. These bills ultimately proving valueless, the period at which the loss was sustained by the Company would in each case have to be referred to the date of the insolvency of each debtor, and the inquiries consequent upon such a reference could, in fact, never be carried out. This difficulty is obviated, in most cases, by the understanding that the buyer buys into the concern just as it stands, and then no question arises as to the liability of the seller to future calls. If the capital has not been all called up, the buyer may have the benefit, or he may come into the concern at the time that it is absolutely insolvent: for that there is no help.

This deed, however, has a particular provision that the seller shall be absolved from future liability, but that he shall be still liable for losses already incurred; and that clause has given rise to the question before me. The deed, after giving certain directions authorizing transfers, as to which I shall presently advert, provides, in the twenty-sixth clause, that, wherever any share is transferred, the man who makes the transfer shall be “released
from

from all subsequent claims, demands, and obligations in respect of the same shares, and from all future observance and performance of the covenants:"—if it had stopped there, that provision would have extended to release the seller from all prior obligations, whether resulting in losses or not; but that is followed by the proviso, "that nothing in this article contained shall extend, or be construed to extend, to release the previous holder of shares so forfeited or transferred as aforesaid from his proportion of the losses (if any) sustained by the Company up to the period of his ceasing to be such holder." Now, if the ascertainment of these losses is provided for by the deed of settlement, then the clause which I have last read is a sensible one, as it enables the party buying to know the state of the concern, and the party selling to know the state of his liabilities, while the Company would have, what is contended is the true construction, the continuing liability of the outgoing member in respect of the losses thus ascertained. It has been contended on both sides, but upon this point I give no opinion, that the purchaser is liable to the whole extent of the liability of any partner—that is, as well to future as to past transactions, and that the object of this clause was only to make the seller of the shares liable in respect of past losses, as a surety for the purchaser of the shares. I have been very much pressed in argument as to the meaning of the expression "the losses (if any) sustained by the Company up to the period of his ceasing to be such holder." It has been with much force argued that this cannot apply to anything except what is a loss beyond the whole capital, and, whilst any portion of the capital remains uncalled up, that there can be no loss within the meaning of this proviso, for that the loss which has ensued at any given moment, before all the capital is called up, only affects the price of the shares, and beyond all doubt, it affects the market value of the property.

1852.

 HOLME'S
 CASE.

1852.
 HOLME'S
 CASE.

property. The state of the concern may not be known accurately ; the price of shares fluctuates, as the concern is considered to be going down or advancing to a premium. The question, however, which now calls for decision is, whether there was any ascertained loss within the meaning of the twenty-sixth clause, for which Mr. *Holme* remained liable, and that depends upon the true construction of the deed under which this Banking Company was constituted. The case of *Ex parte Hawthorn* (a) was relied upon by the Appellant, in reply ; but, on looking into that case, I find it has no bearing upon the present. There the question turned entirely upon the party going out : being still liable to creditors under the Act 7 Geo. 4, c. 45 ; three years had not elapsed, the party was therefore clearly liable in respect of past losses to creditors, and consequently he was properly placed as a contributory on the list, under the Winding-up Act. There was no decision as to what extent he was liable, but only that he was liable to be placed on the list as a contributory. In my opinion that case was rightly decided ; but I do not think it has any bearing upon this.

This deed provides, in section sixty-nine, that the Directors shall keep proper accounts of all the transactions of the Company, and of all profits and losses arising on the concern, and they are to exhibit the actual value of the capital, which they are to estimate according to the best of their judgment. If the Directors had done their duty in this respect no question could have arisen, because it is beyond all doubt that, under the twenty-sixth section, the liability of the seller continues in respect of past losses. These ought to have been shown upon the face of the accounts, and then no difficulty could have arisen ; but the Directors have in this respect entirely neglected their duty.

In

(a) 1 Mac. & G. 49.

In a previous section, the forty-fifth, which embodies the sixty-ninth section, there is this further direction: "At every half-yearly general meeting, the Directors shall exhibit to the shareholders assembled such a balance sheet as they are required to prepare by the sixty-ninth article." There is no doubt that this is cumulative; for besides giving such a balance sheet as is directed by the sixty-ninth article, they are directed to give "such a statement of the probable amount of the losses to be apprehended from the subsisting accounts and engagements of or with the Company, and generally of the state and progress of the affairs of the Company up to the 30th day of *June* and the 31st day of *December* immediately preceding such meeting, as the Directors shall deem expedient for the interest of the Company to be made public." Thus, they are not only required by the sixty-ninth clause, which is imperative, to state the true value of the capital as it actually exists, but they are, in addition, by the forty-fifth clause, to state what the probable effect of pending transactions may be on the concern; they are however to have such a discretion as will not throw on the public unnecessarily a statement of probabilities which may never occur. The forty-fifth clause concludes with these words: "And every such balance sheet shall be binding and conclusive on all the shareholders, their executors, administrators, and assigns, unless errors shall be discovered therein respectively before the next half-yearly general meeting, and in that case such error only shall be rectified." By this clause I consider the balance sheet as rendered by the Directors, on whom the duties devolved, actually binding on all the partners in this concern, unless errors were produced. The partners entering into this concern certainly chose to have as little power over it as it was possible for men to have, and they have chosen implicitly to trust in their Directors; for, by the sixteenth section, it is expressly provided that no shareholder,

1852.
HOLME'S
CASE.

1852.
HOLME'S
CASE.

holder, not being a Director or an Auditor, &c., is to have the power to call for or inspect the documents, or any of the accounts, of the Company. The general body of the shareholders, therefore, must take the accounts just as they find them. It was said that, in point of fact, Mr. *Holme* and the rest of the shareholders knew that the accounts were made up contrary to the truth, and to represent profits, when there were no profits, and when in fact the losses considerably outweighed the profits. I think that argument tells against the party who makes use of it; because, if all the partners were aware that those were not true accounts, but chose to go on deceiving themselves and the public, they cannot afterwards be permitted to say that the accounts are not to be binding between themselves in transactions which have been founded on those accounts. Moreover, it is in evidence that no transfer has taken place without the consent of the Directors, and in no case has an account been taken to ascertain what the actual losses were, with the view of calling upon the transferor to contribute to such losses; therefore all the partners chose to deal with the accounts as they were furnished, and, so dealing with those accounts, they must necessarily be bound by them as between themselves.

It is material to consider how the transfers were to be carried into effect; by the twenty-first clause the Company guarded against any shareholders escaping from the Company by making a transfer while any calls remained unpaid. Then by the twenty-second clause, which is of very great importance, the deed directs what I do not remember ever to have seen before. "That once in every half-year the Directors shall set a value upon the shares, and such value shall, for the purposes of these presents, be deemed the true and actual value thereof for the time being." Now, if
it

1852.

HOLME'S
CASE.

it had stopped there, no man could sell a share until a value had been put upon it by the Directors; that value declared by the deed for the purpose of the deed to be the true and actual value thereof for the time being. Now, "actual value" there must mean actual value with reference to the actual state of the concern. It may be taken for granted that nobody knew it properly but the Directors; they had the means of knowledge, and it was their duty to have fixed the value according to what they considered to be the actual state of the concern, as they were bound to purchase at that value. After stating that it shall be lawful for the shareholders, with the consent of the Directors, to sell, the clause proceeds, that, "for the purpose of obtaining such consent, the holder of the shares proposed to be transferred shall give notice to the Directors," and so on, of the proposed sale. Then there is a proviso, "that before any shares shall be sold the same shall be first offered to the Directors on behalf of the Company, at the lowest price the holder thereof shall agree to take for the same, provided also, in case the Directors shall refuse their consent to any transfer of shares, they shall, on the request of the holder thereof, be obliged to purchase the same out of the funds and on behalf of the Company, at the value thereof for the time being set upon them as aforesaid." There can be therefore no transfer without the consent of the Directors, and if they refuse such consent they themselves must become the purchasers at the value which they have fixed. Suppose they had become the purchasers at the value in this case, and that must be assumed as possible in every case, because they would have them forced upon them if they had not consented to the sale, can it be said that any remaining obligation continued in the seller after the published statement of the accounts of the Company? The purchase would have been then by the Directors as representing

1852.
~~~~~  
HOLME'S  
CASE.

senting the Company. The Directors having made out the balance sheets, and having set a value on those shares, and bought them at that value under the compulsory power of the deed, could not turn round on the seller and call upon him to make good losses which had accrued at that time, and which were never before mentioned; and if they could not, it follows that an indifferent purchaser could not, because an indifferent purchaser stands only in the place in which the Directors would have stood if they had purchased.

The real question on the whole of this deed is whether Mr. *Holme* is liable upon the accounts which have been made out by the Directors, and which have been approved at various general meetings, and which in no one instance show any loss unprovided for. I can nowhere find any evidence of such loss as is indicated under the twenty-sixth section, and to which Mr. *Holme* was liable when he sold his shares. Undoubtedly there is the affidavit of the manager, Mr. *Hedley*, who kept the accounts, and that affidavit may be perfectly true. Without saying I discredit it, I must say it has no weight with me. He assisted most improperly in preparing these accounts, while he was bound to act faithfully and honestly towards the whole body of shareholders; but he now comes forward and swears that from the first he knew the growing insolvent state of this Company, and always assisted in concealing it; that act of concealment leads to the impossibility of charging Mr. *Holme* as a contributory. I repeat that at this moment there is not a particle of evidence before me to show that there was at the time when Mr. *Holme* sold these shares any actual loss sustained upon which I can possibly act. Of course, if there was a loss the deed would undoubtedly bind him to that loss; but I can find no such loss, and I am of opinion that under the provisions of the deed the losses for which it was intended



**i**n tended an outgoing shareholder should continue liable  
**w**ere such as should appear on the balance sheet, so as to  
**l**ead to no possible difficulty. If the directions of the deed  
**h**ad been observed there would have been no difficulty.  
**I** should then only have had to open the particular ac-  
**c**ount at the time of the transfer, and I should have seen  
**w**hat the amount of the loss was to which this gentleman  
**w**as liable. The balance sheets before me show a pros-  
**p**erous state of affairs and a division of profits ; on these  
**b**ounds I am clearly of opinion that this gentleman is  
**n**ot liable as a contributory in respect of any loss ; and,  
**l**ooking at the dealings of this Company, I think no loss  
**c**an be shown, and, therefore, without any reservation, I  
**d**ismiss this appeal with costs.

1851.

HOLMES'S  
CASE.

1852.

June 1. In the Matter of The NORTH OF ENGLAND  
JOINT STOCK BANKING COMPANY and of  
The JOINT STOCK COMPANIES WINDING-  
UP ACTS, 1848 and 1849.

## CROSFIELD'S CASE.

Before The  
Lord Chan-  
cellor LORD  
ST. LEON-  
ARDS.

The testatrix  
was the  
owner of  
shares in a  
Joint Stock  
Company,  
and appointed  
R. H. and J.  
C. her execu-  
tors ; R. H.  
was the acting  
executor, and  
the estate  
was wound  
up with the  
exception of  
the shares ;  
the probate

THIS was an appeal by *James Crosfield*, one of the  
executors of *Ann Hall*, against the decision of the  
Vice-Chancellor *Knight Bruce*, pronounced on the 17th  
*April* 1851, affirming that of the Master charged with  
the winding-up of the above Company, who on the 26th  
*February* 1851, on reviewing his settlement of the list  
of contributories, had included the name of *James Cros-  
field* in the list as a contributory for fifteen shares in the  
character of one of the personal representatives of the  
said *Ann Hall* deceased.

*Ann Hall* by her will, dated the 19th *November* 1829,  
directed the payment of her debts out of her personal  
estate, and devised certain freehold property to her  
daughter

of the will was entered in the books of the Company ; R. H. sold some of the  
shares and received the dividends on those which remained unsold, but J. C.  
never in any way communicated with the Company, or interfered in the  
matter. More than nine years after the death of the testatrix the Com-  
pany failed, and on being wound up under the Winding-up Act 1848, the  
Master placed the name of R. H. alone on the list of contributories as per-  
sonally liable ; he subsequently, and after the passing of the Winding-up  
Amendment Act 1849, reviewed his decision, and placed the names of both  
R. H. and J. C. on the list as liable in the character of executors : Held, on  
the application of J. C. to have his name taken off the list, that the 17th section  
of the Amendment Act was retrospective as well as prospective in its effect,  
and enabled the Master to review his former decision : Held also, that there was  
nothing in the facts of the case in reference to the dealings between the Com-  
pany and R. H., or in the provisions of the deed of settlement of the Com-  
pany, that varied the rights of the Company in respect to the liability of  
J. C. to contribute in his character of executor.

daughter *Rebecca Hall*, chargeable with 250*l.* given to her son *Richard Hall*: she also gave a legacy of 10*l.* to *James Crosfield*, and then gave and bequeathed all the rest residue and remainder of her money, securities for money, goods and chattels, and personal estate, unto the said *Rebecca Hall* and *Richard Hall* equally between them share and share alike, and to their several and respective executors administrators and assigns, absolutely: she appointed *Richard Hall* and *James Crosfield* executors of her will.

1852.  
  
 CROSFIELD'S  
 CASE.

*Ann Hall* died on the 30th *December* 1838, and her will was proved by both executors on the 13th *April* 1839. The personal property was all realised and divided according to the will, except thirty shares in the above Company, and all accounts of the estate were closed, except as to those shares, before the end of the year 1840.

It appeared from the evidence before the Master, that in 1840 the certificates of the shares were placed in the hands of *R. Hall* for the purpose of being sold, but the time being unfavourable for such sale, the intention was not carried into effect. *R. Hall* then took the certificates to the Bank, producing at the same time the probate of the will of *Ann Hall*. *J. Crosfield* alleged that he had supposed that *R. Hall* did this for the purpose of having the shares entered in his own name: the fact, however, was, that the shares were entered in the names of *R. Hall* and *J. Crosfield* as executors of *A. Hall*. No communications ever took place between the Bank and *J. Crosfield* in reference to the shares: *R. Hall* received the dividends and corresponded with the Bank on the subject of the shares. The letters which thus passed between *R. Hall* and the Bank, and the manner in which the shares were therein spoken of, were relied on by *J. Crosfield* as showing that the Bank treated

1852.  
CROSFIELD'S  
CASE.

*R. Hall* as owner. In 1845, *R. Hall* sold fifteen of the shares, and gave the required notice of the transfer as "executor of the said *Ann Hall*."

In 1848 the Banking Company failed, and the Official Managers appointed under the Winding-up Act 1848, left in the office of the Master a list of contributories, in which were included the names of *R. Hall* and *J. Crosfield*, as contributories for fifteen shares, in the character of executors of *Ann Hall*. On the 22nd December 1848, the Master settled this list, and upon the evidence, and on the admission of *R. Hall* that he had received dividends on the shares, he included *R. Hall* in the list as a contributory personally responsible for the said fifteen shares, and struck out and excluded the name of *J. Crosfield* from the list.

On the 26th February 1851 the Master, on the application of the Official Managers, reviewed his settlement of the list, as regarded *R. Hall* and *J. Crosfield*, and came to the decision as to the latter, which it was the object of the present appeal to set aside: he also included *R. Hall* in the list as a contributory for the said shares in his character of one of the personal representatives of *Ann Hall*.

The Vice-Chancellor, in affirming the decision of the Master, proceeded apparently on the ground that there had been no dealings between the Company and *R. Hall* inconsistent with the proper dealing between the Company and an acting executor of a will, thus leaving *J. Crosfield's* character and consequent liability as an executor unaffected.

The affairs of the Banking Company were managed under the provisions of a Deed of Settlement, dated the  
14th

**14th November** 1832, the following Articles of which applied to the question raised on the present Appeal.

1852.  
CROSFIELD'S  
CASE.

No. 28. "The husband of any female sharcholder, or ~~the~~ executor administrator or legatee of any deceased ~~shareholder~~, or the assignee of any bankrupt or insolvent ~~debtor~~ possessed of shares, shall not be a member of ~~the~~ Company in respect of such shares as shall be vested ~~in~~ him in any of the aforesaid capacities respectively, ~~b~~ut such assignee of a bankrupt or insolvent debtor shall ~~se~~ll and dispose of such shares in manner and subject to ~~the~~ provisions hereinbefore expressed and contained with ~~re~~spect to the sale and transfer of shares; and any such ~~h~~usband executor administrator or legatee as aforesaid ~~sh~~all be at liberty either to sell and dispose of the shares ~~so~~ vested in him in like manner and subject as aforesaid, or at his option to become a member of the Company in respect of such shares on complying with the provision of these presents as next hereinafter expressed in that behalf."

No. 29. "The husband of any female shareholder, or the executor administrator or legatee of a deceased shareholder, who shall be desirous of becoming a member of the Company in respect of the shares vested in him in any of such capacities respectively, shall give notice in writing at the Banking house of the Company in *Newcastle-upon-Tyne* of such his desire, in which notice shall be expressed the name and place of abode of the person giving the same, and the name of the shareholder in whose place or right he claims, and the number of shares in respect whereof he is desirous of becoming a member; whereupon and upon otherwise complying with the provisions of the deed of settlement, he shall be admitted and become a member of the Company in respect of such shares, and have the same transferred into

1852.  
CROSFIELD'S  
CASE.

his name accordingly, and shall be personally charged with the duties and liabilities incident to the ownership of the same."

No. 30. "The husband of any female shareholder, or the executor administrator or legatee of any deceased shareholder, who shall not under the provision lastly hereinbefore contained elect to become a member of the Company in respect of the shares vested in him in any such capacity, and also the assignee of every bankrupt or insolvent debtor possessing shares, shall be entitled to receive any dividend which shall have become due on the shares so vested in him in any such capacity as aforesaid before his title to the same shares accrued; but no dividends which shall become due on the same shares after his title shall have accrued shall be payable to or demandable by him, but shall, till some person shall have become a member of the Company in respect of the same shares, remain in suspense and shall not be paid till the transfer thereof shall be completed and the new holder thereof shall claim the same; and every transfer shall carry with it the profits and interest and share of capital and surplus or guarantee fund in respect of the shares transferred, so as to close all the right and interest of the party or parties making such transfer in respect of such transferred shares."

The 103rd Article provided that the holders of any shares, and their heirs executors and administrators, should continue bound, in respect of such shares remaining part of their assets, duly to perform all the stipulations and articles contained in the Deed of Settlement in relation to those shares.

Mr. *J. Russell*, Mr. *Daniel*, and Mr. *Randell* in support of the Appeal.

They

They submitted that it was not competent to the Master to review his decision in the way he had done; that this was clearly so with regard to the Winding-up Act 1848, under the 79th and 81st sections of that Statute; and that the 17th section of the Amendment Act 1849, which was supposed to confer jurisdiction, did not repeal the former enactment, but must be construed in reference to it, and must be considered as not intended to give the Master an absolute power of reviewing his previous decision, but only to do so at the instance of a party having an interest, *Ex parte Best (a)*.

1852.  
CROSFIELD'S  
CASE.

[The LORD CHANCELLOR referred to the 27th section of the Amendment Act 1849, as militating against this view of the 17th section (b)].

They

(a) 1 *Sim. N. S.* 193.

(b) The 79th section of the Winding-up Act 1848 (11 & 12 *Vict.* c. 45), provides that the list, when settled by the Master, shall be conclusive unless cause be shown to the contrary; and the 81st section of the same Act provides, that contributories may summon other persons to show cause why they should not be inserted in or excluded from the list.

The 17th and 27th sections of the Winding-up Amendment Act 1849 (12 & 13 *Vict.* c. 108) are as follow:—

XVII. “And be it enacted, That it shall be lawful for the Master from time to time to reconsider and review any order or proceeding which may have been made by or may have taken place before him under the said Act, upon such terms

and in such manner as he thinks fit.”

XXVII. “And be it enacted, That the power by the said Act given to contributories to summon any other person to show cause why his name should not be included in or specially excluded from the list, and the power of the Master to declare such person included in, or excluded from, the list, shall and may be exercised from time to time so long as the list has not been wholly settled, although the person so to be summoned have been already included or specially excluded (as the case may be) as respects any other share or interest in the Company, than the share or interest in respect of which he is proposed to be included in or specially excluded from the list.”

1852.  
CROSFIELD'S  
CASE.

They contended, citing the twenty-eighth, twenty-ninth and thirtieth articles of the Company's Deed, that the Company could not be regarded as having treated *R. Hall* as executor, referring on this point especially to the payment of the dividends, and to the allowing of the transfer of the shares to be managed by him alone. They also mentioned *Straffon's Executors' Case* (a).

Mr. *Bacon* and Mr. *J. V. Prior*, for the Official Managers, supported the decision of the Vice-Chancellor.

They submitted that the seventeenth section of the Amendment Act 1849, gave the Master an entire control over the proceedings before him, so as to enable him to open a matter again, as he had done in the present instance; that the decision in *Ex parte Best* (b) did not apply, for the Vice-Chancellor *Knight Bruce*, having conferred with Lord *Cranworth* respecting it before deciding the present case, had stated that Lord *Cranworth* informed him that he had there decided against the jurisdiction of the Master on the ground that the question raised was not one which rested on the Master's former decision alone, but that that decision had been carried by appeal to the Vice-Chancellor and had been adjudicated on by him.

[*The LORD CHANCELLOR*.—The decision in *Ex parte Best* is quite right.]

They contended with regard to the articles of the Deed of Settlement, and to the dealings between the Bank and *R. Hall*, that the latter, when examined, did not make out the inference deduced from them by the other side, and were quite consistent with the continuance of *J. Crosfield* in his character and liability of executor.

(a) 16 *Jur.* 435; since reported 1 *De G., Mac. & G.* 576.

(b) 1 *Sim. N. S.* 193.



recutor. They referred also to the 103rd article of the deed.

1852.  
CROSFIELD'S  
CASE.

Mr. *J. Russell* in reply.

He contended that the provision contained in the seventeenth section of the Amendment Act 1849, was not retrospective as to the date of the Act; that to hold it retrospective would be to destroy any prospective effect in the section, as the words would not admit of the double application, and that it was only in cases of absolute necessity that an Act of Parliament ought to be construed retrospectively. He submitted that it would be inconsistent to place a limit on the right of appeal in the manner done by the Act in question, and yet to nullify it by allowing an unlimited right to the Master to review his former decisions.

*The LORD CHANCELLOR.*

I very much regret being compelled to decide against Mr. *Crosfield*: his case is certainly a hard one, for without having been guilty of any misconduct, he is subjected at a distance of some years to a considerable liability which ought not to fall upon him. I am afraid, however, that the rule of law is too strong for me.

The first ground which is taken against his liability is upon the Act of 1849; and it is insisted that the power there given to the Master by the seventeenth section is not retrospective, and that at all events, if retrospective, I must decide it to be altogether so and not at all prospective, for that it cannot be both one and the other. From this view, however, I entirely dissent. I think that the words are clearly retrospective, and that they also very naturally and easily bend to a prospective application to a then future event. A past event has already taken place to which the words will apply and  
a future

1852.  
CROSFIELD'S  
CASE.

a future event will by and by take place, to which they will also apply. I cannot see that there is any doubt upon the retrospective operation of the words grammatically considered, and it is clear what the intent of the Act really was. There had been a great number of cases in which according to the more recent decisions the Masters had miscarried, and it was not possible, as the law stood, to review those cases; it could only be done under an Act of Parliament. It is said that the twenty-seventh section of the Act of 1849 is inconsistent with this construction, but it does not appear to me to be so. The seventeenth section in reference to cases wherein, as in the present instance, any power to review was gone under the Act of 1848, gives to the Master a more extended power than it was considered right to confer on a contributory, while, at the same time, the Act allows the contributory to bring before the Court a party included or excluded under the former Act, limiting, however, this right to such shares as had not been previously brought under adjudication. It appears to me, therefore, that there is no doubt about the Act being applicable to this case.

The next question is whether I can hold that what has taken place between the Company and Mr. *Hall*, one of the executors, varies the right of the Company or of the Official Managers as representing them. The shares in question belonged to *Ann Hall*; they were entered regularly in the books of the Company in her name, and she by her will gave them to her daughter and son. *Richard Hall*, the son, was one of the executors: Mr. *Crosfield* was joint executor with him, and does not appear to have taken an active part in the executorship; he says that he wound up the estate years ago, except with reference to the thirty shares in this Company, and that he considered that he had  
nothing

1852.  
  
 CROSFIELD'S  
 CASE.

nothing further to do in regard to them. As to this winding-up of the testatrix's estate, it is all very well as between the co-executor and the legatees, but has not the slightest bearing on the claims of persons who are entitled to come as creditors against the assets. Mr. *Crosfield* is unfortunately in the predicament in which it often happens that a man finds himself who proves and acts as executor, but who, trusting to his co-executor in respect of matters for which he may be made and clearly is liable, does not look after his co-executor, or see how he executes his duties. On the death of the testatrix, Mr. *Crosfield* proved the will and acted as executor, thus becoming in all respects liable. When the probate was carried into the office of the Company, a very proper entry was made; it was made under the original name of *Ann Hall*, and was to the following effect,—“ Probate, &c., *Ann Hall's* will exhibited here, 9th March 1840; *Richard Hall* her son, and *James Crosfield*, executors.” This was a compliance with the direction in the Act of Parliament, and gave the executors a right to deal with the shares according to the provisions of the Deed constituting the Company.

One great and the leading point which has been made on the part of the Appellant is this, that by the thirtieth article of the Deed, no executor is entitled to receive the profits of the share of his testator until he shall have become a member, but that those profits shall be kept in suspense, accumulating; and it is said that it is a great damage to Mr. *Crosfield* that the money is not now in deposit as it ought to have been, because if it had been so, it would have gone in a great measure to answer the present liability; and, further, that this circumstance shows that Mr. *Richard Hall* had been accepted as a member, and that the Company are bound by that acceptance. I have held, and am prepared to hold

1852.  
CROSFIELD'S  
CASE.

hold again, that Directors may do acts, in reference to the transfer of shares, binding upon the whole body, by which they waive certain formalities which they ought to have observed. In the present case there was a privilege conceded to one of two executors, but it was a privilege and benefit to both, for Mr. *Crosfield* might have availed himself of it, had he chosen to do so. If however the money had been retained in deposit, Mr. *Crosfield* would have derived no benefit from it, for the latter part of the article, which has not been adverted to, says, that the money shall "remain in suspense, and shall not be paid till the transfer thereof shall be completed, and the new holder thereof shall claim the same, and every transfer shall carry with it the profits and interest and share of capital:" the consequence of which is, that if this money had remained in suspense, it would have been a fund for the benefit not of Mr. *Crosfield*, but of the person who bought the shares, supposing them to be saleable, which of course they now are not. Mr. *Crosfield* has therefore, in fact, sustained no loss, though he might have had a benefit.

Then the question arises, whether the acts of the Directors can be held to be an admission of *Richard Hall*, in his own proper person, as a member and owner of the shares. The will gave him no right to be so admitted, and the Deed of the Company does not seem to me very clearly to point out what is to be done in the case of several executors. Without, however, deciding this, I am clearly of opinion that the acts referred to as constituting an admission of *R. Hall* as a member cannot be treated as having that effect. Every instance of dealing with this gentleman has, in fact, a contrary character: he never asked to be a member, in the proper sense of that term: when he sold the fifteen shares, the notice he gave was as executor, and in  
two

two out of every three of the letters written by him, he speaks of the shares as being those of *Ann Hall*. In no one of the documents which I have before me is he introduced as a member. Credit is given for the dividends to the executors; and, although it is discharged on the opposite side of the account by the payment to him, yet of course it must be in that character in respect of which, on the opposite side, the credit is given. I must say I never saw a case in which there was less foundation for the argument, that the dealings between the parties had altered the rights that existed between them. I have looked most carefully, but without success, to see if I could find anything of the sort, for I have been anxious to relieve Mr. *Crosfield* if I possibly could.

1852.  
  
 CROSFIELD'S  
 CASE.

The 103rd article of the Deed referred to by Mr. *Prior*, shows that these parties cannot be considered as having been taken by surprise in being treated as shareholders, for it contains an independent covenant by the shareholders, binding their real and personal representatives, that they will continue liable in respect of any shares that form part of their assets. The reason for this being introduced was, that the executors *qua* executors not becoming members and not having sold would not themselves be responsible personally, and that until they sold and other persons came in their place there would be no personal responsibility. The original shareholders therefore entered into this covenant, that their real and personal assets should be considered liable for all the conditions under the Deed which would attach to any shareholder whilst the shares remained the assets of that particular shareholder.

The case of the Appellant is without doubt a strong one on the merits, but the law is too clearly against him to enable me to entertain any doubt in the matter ;  
 and

1852.  
 CROSFIELD'S  
 CASE.

and I am therefore under the necessity of affirming the decision of the Vice-Chancellor.

I shall not, however, do what I consider myself bound to do in most cases where a party chooses to try the experiment of an Appeal, in which he does not succeed, namely, to dismiss the Appeal with costs. This is so hard a case on Mr. *Crosfield*, that I am not surprised at his attempting to relieve himself from such an unmerited infliction. I shall dismiss the Appeal, but without costs.

June 9.

In the Matter of the Trusts of the Will of  
 AGNES ATKINSON,

AND

Before *The*  
*Lord Chan-*  
*cellor, LORD*  
*ST. LEON-*  
*ARDS.*

In the Matter of the Act 10 & 11 Vict. c. 96.

The title of an assignee for value of an equitable interest is not affected by a previous insolvency of the assignor, the assignee having no notice of that insolvency.

The effect of the Act 7 Geo. 4, c. 57, is to vest in the assignee in insolvency all the property of the insolvent. but subject to all equities to which it would be liable in the hands of the insolvent.

THIS was an Appeal by *Samuel Sturgis*, the Provisional Assignee of the estate and effects of *Alfred Argles*, against so much of an order made by the Vice-Chancellor *Knight Bruce*, dated the 12th *July* 1851, as directed that the share of *Alfred Argles* in certain Bank Annuities should be transferred and paid to *John Hook*, the assignee for value of such share. The following were the facts which gave rise to the question involved in the Appeal.

*Agnes Atkinson* by her will, bearing date the 16th *July* 1814, gave to her executors a sum of 700*l.* upon trust to invest the same and to pay the dividends to *Ann Argles* for life, and, after her decease, upon trust to assign and transfer

1852.  
 {  
*In re*  
 ATKINSON.

chase, he had no notice, directly or indirectly, of the insolvency. The Vice-Chancellor refused to give effect to the claim of the Provisional Assignee, holding that the assignee in insolvency took no more than would have passed to him by any assignment which the insolvent could have made. His Honor therefore directed payment to *J. Hook* of the share of *Alfred Argles* in the stock in question, observing that he entertained no doubt on the subject, although the question did not appear to have been previously decided, and was one of considerable importance.

From this decision the Provisional Assignee appealed to the Lord Chancellor, as above stated.

*Mr. Follett* and *Mr. Osborne*, for the Appellant (*a*).

They stated the question as being, whether a purchaser for valuable consideration, giving notice, could exclude the title of the assignee in insolvency. They contended that the case differed from that of competing assignees for value, and that the effect of the Act 7 Geo. 4, c. 57, was so absolutely to vest in the assignee all the estate and interest of the insolvent, of whatever kind or description, as not to leave the insolvent anything which, under any circumstances, he could assign, and that no notice to the trustees of the fund was necessary. They referred to the eleventh, sixteenth, and nineteenth sections

(*a*) It was attempted at the opening of the argument, but without success, to show that, as a matter of fact, the executors as trustees of the fund had notice of the insolvency prior to receiving notice of the

assignment to *J. R. Cook*; and the cases of *Smith v. Smith*, 2 *Crompt. & M* 231, and *Meux v. Bell*, 1 *Hare*, 73, and the 42nd section of the Act, 7 Geo. 4, c. 57, were referred to as bearing on this part of the case.

tions of the Act, and distinguished the present from the case of *Dearle v. Hall* (a), which had been cited on the other side, upon occasion of the hearing before the Vice-Chancellor.

1852.  
In re  
ATKINSON.

Mr. *R. Palmer* and Mr. *Schomberg*, who appeared in support of the decision of the Vice-Chancellor, were not called on.

*The LORD CHANCELLOR.*

Two questions arise on this Appeal ; the first, whether the title of the assignee in insolvency is so absolute that it cannot be disturbed ; and secondly, what, under the circumstances as they here appear, are the rights of the assignee for value.

It may be considered as decided, that the assignee in insolvency represents the insolvent ; he stands in his place, and takes only such interest as he can give, and subject to all equities by which the insolvent is bound. It has however been contended that the effect of the Act is so to vest the property that the insolvent cannot afterwards divest it ; but this is not so, for there are no words in the Act giving to the assignee any higher interest than the insolvent himself has : the assignee does not therefore take so as not to be subject to equities as administered in this Court.

It is a settled point, as between two competing parties in reference to equitable interests, that he who takes care and gives notice to the trustees shall get a benefit over him who has not so done. A case occurs to me of *Warburton v. Loveland* (b), before the House of Lords,

(a) 3 *Russ.* 1.

(b) 2 *Dow & Clark*, 480.



1852.

*In re*  
ATKINSON.

Lords, where the contest as to priority arose on the effect of the Irish Register Act, and the decision there clearly shows that the legal interest being in an assignee does not prevent the application of the rule of this Court to which I have adverted.

On the second question, as to what in this case are the rights of the assignee for value, there is no difficulty. The assignee did all that he could ; he swears that he knew nothing of the insolvency, and it is proved that he gave notice. Then it has been said that the decision of the Vice-Chancellor bears hardly on creditors ; but to hold the opposite would be equally hard on the purchaser for value. The result will be to teach assignees to see of what property the insolvent is actually possessed : I consider the point to be in law perfectly settled.—*The Appeal was accordingly dismissed, with costs.*

---

1852.

MONYPENNY v. DERING.

July 17. 19,  
20.

Before The  
Lord Chan-  
cellor LORD  
ST. LEON-  
ARDS.

**T**HIS was an appeal by certain of the Defendants from two orders made in the suit, the one by the Vice-Chancellor *Wigram*, dated the 7th May 1850, and

the J. M. by his

will devised the Maytham Hall estate, being of gavelkind tenure, to trustees upon trust to sell a competent part for the payment of debts, and subject thereto upon trust for P. M. for life, and after his decease for the first son of P. M. for life, and after his decease for the first son of such first son and the heirs male of his body, and in default of such issue, for every other son of P. M. successively for the like interests and limitations, and in default of issue of the body of P. M., or in case of his not leaving any at his decease, for T. M. for life, and after his decease for T. G. M. the eldest son of T. M. for life, and after his decease for the first son of T. G. M. and the heirs male of his body, and in default of issue of the body of the said T. G. M., for every other son of T. M. successively for the like estates and interests, and on failure of all such issue of the body of T. M., upon trust for him his heirs and assigns for ever; P. M. never had any children:—Held, that P. M. took an estate for life with remainder to his first unborn son, if such son had been born, and that all the remainders over were void:—Held, also, that effect was to be given to the gift over to T. M. and his sons in default of issue of the body of P. M., &c. as an independent clause, and that it was consequently valid.

Although by the doctrine of *cy pres* or by implication as applied to the construction of a will, an estate may be carried otherwise than in the exact form and manner indicated by the testator, yet it must always be in favour of a class or part of a class of persons intended to be provided for by the testator.

In construing wills effect may in certain cases be given to the general intent at the expense of a particular intent, but this is not to be done without an actual necessity.

Where an estate is so limited to A. as would generally raise by implication an estate tail, but there are added limitations to the children of A. which are void for remoteness, it is not a general rule to reject these limitations as unimportant and to give to A. an estate tail, although cases may arise in which this would be done in favour of the clear intention of the testator.

The cases of *Pitt v. Jackson*, 2 Bro. C. C. 51, and *Nicholl v. Nicholl*, 2 W. Bl. 1159, observed on.

Where there are gifts over which are void for perpetuity, and there is a subsequent and independent clause on a gift over which is within the line of perpetuity, effect cannot be given to such clause unless it will accord with previous valid limitations.

A gift over made in words comprising only one event will not be construed as made on two events, although in point of fact it may consist very reasonably of two branches, unless it is so expressed by the testator.

J. M. provided by his said will that if P. M. or T. M. or any of their issue should become entitled to the Jodrell estate, then the trustees should stand seised of the devised premises upon trust for the next person entitled thereto under his will, as if the person so succeeding to the Jodrell estate were dead:

VOL. II.

L

D. M. G.

T. M.

1852. the other by the Vice-Chancellor *Knight Bruce*, dated  
 MONYPENNY the 18th *July* 1851.

v.  
 DERING.

A very full report of the case, as heard by the Vice-Chancellor *Wigram*, will be found in the 7th Volume of Mr. *Hare's* Reports, page 568; and it is therefore hoped that the following preliminary statement, though in a much more condensed form than would otherwise have been deemed necessary, will be found sufficient to render the argument and judgment now reported intelligible to the reader.

*James Monypenny* of *Greenwich*, on whose will and codicil the questions in the suit mainly arose, was at the  
 date


T. M. died after the date of the will, and the testator by a codicil declared that his trustees should stand seised of the devised estates upon trust for his wife for life, and then upon the trusts declared by his will, subject to the declaration therein contained with reference to the Jodrell estate. On the death of the widow, P. M. came into possession of the Maytham Hall estate, being at that time entitled to a life estate in remainder in the Jodrell estate, the tenant for life of that estate being then living:—Held, first, that this was not such an interest in P. M. as fell within the intention of the shifting clause, and that it did not in that event come into operation:—Held, secondly, on P. M. afterwards coming into possession of the Jodrell estate on the death of the tenant for life, that then the Maytham Hall estate went over and became vested in the trustees of J. M.'s will:—Held, thirdly, on the construction of the clause generally, that its operation was not confined to one shifting, but that it operated *toties quoties* as regarded the parties named in it.

The Jodrell estate was limited under the will of E. J. to the use of M. J. for life, with remainder to the use of the sons and daughters of M. J. successively in tail, with remainder to the use of S. M. for life, with remainder to her sons and daughters in tail, with remainder to P. M. son of J. M. for life, with remainders to his sons and daughters in tail, with remainder to T. M. another son of the said J. M. for life, with remainders to his sons and daughters in tail, with divers remainders over. The will contained a proviso that if P. M. and T. M. or either of them, their or either of their issue or any other son or sons of the said J. M. or his or their issue, should become entitled to an estate of freehold or inheritance in possession of or in the Maytham Hall estate belonging to R. M., "so as to be in the possession or in the actual receipt of the rents and profits thereof," then and in that case the estates devised by her will should shift from the person so becoming entitled in manner therein mentioned. At the date of the will R. M. was entitled to the Maytham Hall estate, partly in fee and partly as tenant in tail. The Maytham Hall estate was subsequently disentailed and devised and so came to the son of T. M., (who was then entitled in possession to the Jodrell estate,) by limitation as a purchaser, and not by inheritance or under the original limitations existing at the date of the testator's will. Whether, looking at the dealing with the Maytham Hall estate, it became vested in T. M. in such a manner as to make the Jodrell estate go over. *Quære.*

**d**ate of his will seised in fee of certain estates in *Kent*,  
**o**f gavelkind tenure, called the *Rolvenden* or *Maytham*  
*Hall* estates. The property had become vested in him,  
**a**s tenant in tail, on the death of his eldest brother  
*Robert Monypenny* of *Rolvenden*, and he suffered a  
**r**ecovery to bar the entail.

1852.  
MONYPENNY  
v.  
DEBING.

*James Monypenny*, by his will, dated the 11th *February*  
**1**804, after devising portions of his real estates, gave and  
**d**evised a part of the estates above mentioned, called the  
*Maytham Hall* estate, and all the residue of his real estates,  
**t**o trustees upon trust to sell a sufficient part to pay his  
**d**epts and certain legacies, and subject to the above to  
**s**tand seised of all and every his said real estates, “ upon  
**t**rust to permit and suffer my said brother *Phillips Mo-*  
*nypenney* to receive and take the rents issues and profits  
**t**hereof for and during the term of his natural life without  
**i**mpeachment of waste, and from and immediately after  
**h**is decease upon trust for the first son of the body of  
**t**he said *Phillips Monypenny* for and during the term  
of his natural life, and from and immediately after his  
decease upon trust for the first son of the body of such  
first son and the heirs male of his body, and in default  
of such issue, upon trust for all and every other the son  
and sons of the body of my said brother *Phillips Mony-*  
*penny* severally and successively according to seniority  
of age, for the like interests and limitations as I have  
before directed respecting the first son and his issue ;  
and in default of issue of the body of my said brother  
*Phillips Monypenny*, or in case of his not leaving any  
at his decease, upon trust for my said brother *Thomas*  
*Monypenny* for and during the term of his natural life  
without impeachment of waste, and from and imme-  
diately after his decease, upon trust for *Thomas Mony-*  
*penny* (afterwards *Thomas Gybbon Monypenny* the  
father of the Plaintiff,) the eldest son of my said brother

1852.  
  
 MONYPENNY  
 v.  
 DEBING.

*Thomas Monypenny*, for and during the term of his natural life without impeachment of waste, and from and immediately after his decease, upon trust for the first son of the body of the said *Thomas Monypenny*, son of my said brother *Thomas Monypenny*, and the heirs male of his body, and in default of issue of the body of the said *Thomas Monypenny* the son, upon trust for all and every other the son and sons of the body of my said brother *Thomas Monypenny* for the like estates and interests severally and successively according to seniority of age; and in failure of all such issue of the body of my said brother *Thomas Monypenny*, upon trust for him his heirs and assigns for ever. But I do hereby declare, that if it shall happen at any time hereafter that my said brothers or either of them, their or either of their issue, shall become entitled to the real or copyhold estate or any part thereof late of *Elizabeth Jodrell* widow, daughter of the late *Phillips Gybbon*, situate in the said parish of *Rolvenden* or in the parishes of *Denenden Tenterden* or either of them or elsewhere, then and in that case and immediately upon such event taking place, my said trustees and the survivor of them and his heirs shall stand seised of my said estates hereinbefore devised for the benefit of my said brothers and their issue, upon trust for the next person entitled thereto under and by virtue of this my will in the same manner as they would have done if the person so succeeding to the said estates late of the said *Elizabeth Jodrell* were actually dead." And the testator added a power to the devisees to cut timber and grant leases according to the terms laid down in the will.


The testator's brother, *Thomas Monypenny*, died between the date of the will and a codicil to be presently mentioned, leaving his son *Thomas Gybbon Monypenny*,  
 in

is  
 m  
 se  
 i  
 e  
 e  
 n  
 H  
 n  
 A  
 m  
 -  
 -  
 A  
 -  
 C  
 e  
 s  
 -

1852.  
 MONYPENNY  
 v.  
 DERING.

*Sylvestra Monypenny* successively in tail, with remainder to her daughters as tenants in common in tail, with remainder to the use of *Phillips Monypenny*, second son of *James Monypenny* of *Greenwich*, for and during his life, with remainder to trustees during his life to preserve contingent remainders, with remainder to the sons and daughters of the said *Phillips Monypenny* in tail in like manner as to the sons and daughters of the said *Sylvestra Monypenny*, with remainder to the use of *Thomas Monypenny*, third son of the said *James Monypenny* of *Greenwich*, and his assigns during his life, with remainder to trustees during his life to preserve contingent remainders, with remainder to the use of the first second third and other sons of the said *Thomas Monypenny* successively and in remainder one after another as they and every of them should be in priority of birth and the several and respective heirs of the body and bodies of all and every such son and sons issuing, the elder of such sons and the heirs of his and their body and bodies issuing being always preferred and to take before the younger of such sons and the heirs of his and their body and bodies issuing, and for default of such issue, to the use of all and every the daughter and daughters of the said *Thomas Monypenny* in tail, with remainder over to the subsequently born sons of *James Monypenny* of *Greenwich* in tail: and it was thereby provided, that if the said *Phillips Monypenny* and *Thomas Monypenny* or either of them their or either of their issue male or female, or any other son or sons of the said *James Monypenny* of *Greenwich* thereafter to be born or his their or any of their issue male or female, should at any time or times be or become entitled to an estate of frechold or inheritance in possession of or in the messuages lands tenements and hereditaments in the said county of *Kent* then of or belonging to her cousin *Robert Monypenny* Esq. of *Rolvenden*,  
 elder

elder brother of the aforesaid *James Monypenny* of *Greenwich*, or the greatest part of the same messuages lands tenements and hereditaments so as to be in the possession or in the actual receipt of the rents and profits thereof, then and so often as the case should so happen the use and estate which was thereinbefore devised or limited to or which by virtue of her will should come to or devolve upon the said *Phillips Monypenny* or his issue male or female, or the said *Thomas Monypenny* or his issue male or female, or any other son of the said *James Monypenny* of *Greenwich* thereafter to be born or his their or any of their issue male or female, so becoming entitled in possession as aforesaid of and in the said manors messuages lands tenements and hereditaments thereinbefore devised, should immediately from thenceforth cease determine and be void as if the said *Phillips Monypenny* and such other son and sons of the said *James Monypenny* of *Greenwich* thereafter to be born respectively and his and their issue male and female so becoming entitled in possession as aforesaid, was and were then naturally dead without issue male and female of his and their body and bodies; and then and from thenceforth the said manors messuages lands tenements and hereditaments thereinbefore devised should go and remain to and to the use of such person and persons as by virtue of the uses and limitations thereinbefore contained would then be entitled as the next persons in remainder in case the said *Phillips Monypenny* or *Thomas Monypenny* or such other son or sons of the said *James Monypenny* of *Greenwich* thereafter to be born respectively or his or their respective issue male or female, so becoming entitled to the said manors messuages lands tenements and hereditaments then of or belonging to the said *Robert Monypenny* or the greatest part thereof as aforesaid, was or were naturally dead without issue male or female of his her  
and

1852.  
  
 MONYPENNY  
 v.  
 DEBING.


1852.  
 MONYPENNY  
 v.  
 DEBING.

and their body or bodies; and the same person or persons should in every such case be entitled to take the same estate and estates in the said manors messuages lands tenements and hereditaments thereinbefore devised as he she or they would have been entitled to take therein by virtue of that her will if the said *Phillips Monypenny* or *Thomas Monypenny* or such other son or sons of the said *James Monypenny* of *Greenwich* thereafter to be born respectively or his or their respective issue male or female, so becoming entitled to the said messuages lands tenements and hereditaments then of or belonging to the said *Robert Monypenny* or the greatest part thereof, was or were then naturally dead without issue male or female as aforesaid.

Under the several limitations above mentioned of the *Maytham Hall* and the *Jodrell* estates respectively, the devolution of these properties proceeded in the following manner:—As to the *Maytham Hall* estate, the widow of the testator *James Monypenny* received the rents till 1826, when she died; and *Phillips Monypenny* thereupon entered into possession. In 1827, *Phillips Monypenny*, treating himself as tenant in tail in possession, suffered a recovery of the estate, the uses of which were declared to enure to him in fee; and by an indenture dated the 10th *June* 1835, made on occasion of the marriage of *Robert Joseph Monypenny*, he charged it with a sum of money as a jointure to *Susannah Monypenny* the wife of *R. J. Monypenny*. In *January* 1841, *Phillips Monypenny* died without having had any children, and by his will devised the *Maytham Hall* estate, amongst other uses, to the use of *Robert Joseph Monypenny* for life, remainder to his eldest son *Robert Phillips Dearden Monypenny* for life, remainder to his first and other sons in tail male, &c. Under this devise *Robert Joseph Monypenny* entered into possession of the estate, and died in  
*September*



September 1842, and thereupon *Robert Phillips Dearden Monypenny* entered into the receipt of the rents and profits, subject to the charge of the jointure to the widow, and was in possession of the estate at the time of the institution of the present suit.

1852.  
  
**MONYPENNY**  
*v.*  
**DERING.**

With regard to the *Jodrell* estate, *Mary Jefferson*, the devisee firstly named in the will of *Elizabeth Jodrell*, died in 1804 (having been previously married) without issue, and thereupon *Sylvestra Monypenny* (afterwards *Sylvestra Hutton*), the devisee secondly named in the will, entered into possession of the estate as tenant for life, and continued in possession until her death in 1836, without issue. In 1830, *Thomas Gybbon Monypenny*, the eldest son of *Thomas Monypenny* deceased as above stated, (being the next in remainder under the will of *Elizabeth Jodrell* to *Phillips Monypenny* who was then in possession of the *Maytham Hall* estate as above mentioned) conceiving that the shifting clause in the will of *Elizabeth Jodrell* had, under the circumstances, become operative, suffered a recovery of the *Jodrell* estate with the concurrence of *Sylvestra Hutton*, thus converting his estate of a remainder in tail into a remainder in fee; and on the death of *Sylvestra Hutton* in 1836, he entered into possession of the *Jodrell* estate as tenant in fee.

In 1837, cross releases were executed between *Phillips Monypenny* and *Thomas Gybbon Monypenny*, the latter by indentures dated the 3rd and 4th October 1837 releasing to *Phillips Monypenny* and his heirs all his (*T. G. Monypenny's*) estate and interest in the *Maytham Hall* estate, and *Phillips Monypenny* by indentures of the same date releasing to *Thomas Gybbon Monypenny* and his heirs, all the estate and interest which he (*P. Monypenny*) could claim in the *Jodrell* estates.

Doubts having been raised as to the rights of the  
several


1852.  
 MONYPENNY  
 v.  
 DERING.

several parties mentioned in the limitations above set out, under the terms of those limitations as affected by the circumstances hereinbefore mentioned, the present suit was instituted, in *November* 1842, by *Robert Thomas Gybbon Monypenny*, then an infant, the eldest son of *Thomas Gybbon Monypenny*, stating, among other things, that he was advised that by reason of the death of *Phillips Monypenny* without issue, and of the *Jodrell* estate having come into the possession of *Thomas Gybbon Monypenny* the plaintiff's father in fee simple, the *Maytham Hall* estate had, under the provisions of the will of *James Monypenny* as to the brothers of *James Monypenny* or their issue becoming entitled to the *Jodrell* estate, shifted from *Thomas Gybbon Monypenny* to the Plaintiff, and that the Plaintiff was entitled in the events which had happened to an equitable estate tail in possession in the *Maytham Hall* estate, and to the consequent account of the rents and profits thereof; or that if the estate had not shifted, then that he was entitled to the estate in remainder immediately expectant on the life estate of his father *Thomas Gybbon Monypenny*. The Bill prayed in the alternative a declaration accordingly.

To this suit which brought in question the construction to be put on the will of *James Monypenny* together with the validity of the recovery suffered by *Phillips Monypenny* and the consequent dispositions made by him of the *Maytham Hall* estate, the trustees of the legal estate, the Plaintiff's father *Thomas Gybbon Monypenny*, *Robert Phillips Dearden Monypenny* who was in possession of the *Maytham Hall* estate as above mentioned, all parties claiming under or through *Phillips Monypenny*, the parties claiming in remainder under the will of *James Monypenny*, and the heirs in gavelkind of *James Monypenny*, were made Defendants.

By

By an order made on motion dated the 3rd *November* 1843, preliminary inquiries were directed; and the Master by his report, dated the 29th *April* 1844, found that there was no issue of *Phillips Monypenny*, and he also found the other material facts relating to the pedigree of the Plaintiff and the Defendants, and relating to the surviving issue of the deceased brothers of the testator, and to the heirs at law and heirs in gavelkind of the testator, and to his deceased brothers nephews and grand-nephews.

1852.  
  
 MONYPENNY  
 v.  
 DERING.

The cause came on to be heard before the Vice-Chancellor *Wigram* on the 24th *November* 1845, when a Case was ordered for the opinion of the Barons of Her Majesty's Court of Exchequer on the following questions:—"First, What estate or estates in possession or in remainder did *Phillips Monypenny* take under the will and codicil of the testator *James Monypenny* in the devised property. Secondly, Did *Thomas Gybbon Monypenny* take any and what estate or estates in the devised property under the same will and codicil. Thirdly, Did *Robert Thomas Gybbon Monypenny* take any and what estate or estates in the devised property under the same will and codicil. Fourthly, Did *Phillips Monypenny* acquire any and what estate in the devised property under the recovery of 1827. Fifthly, Did *Susannah Monypenny* take any and what estate or interest in the devised property under the deed of the 10th of *June* 1835. Sixthly, Did the coheirs in gavelkind of the said testator at his death take by descent from the testator *James Monypenny* any and what estate in the devised property."

The Case was argued before the Court of Exchequer on the 29th *April*, and the 4th and 5th *May* 1846, and their Lordships afterwards gave the following certificate

1852. .  
 MONYPENNY  
 v.  
 DEBING.


cate:—"We have heard the Case argued by Counsel, and have considered the same, and questions 1, 2, 3. We are of opinion that under the will and codicil of *James Monypenny*, his brother *Phillips Monypenny* took an estate for his life in remainder expectant on the death of the testator's widow, with remainder to his eldest son for life, and that all the subsequent limitations are void for remoteness, and consequently that neither *Thomas Gybbon Monypenny* nor his son took any estate under the devise in question. Fourth, We think that by virtue of the recovery *Phillips Monypenny* acquired an estate in fee simple by wrong, liable to be defeated by the parties having rightful title: And that Fifth, *Susannah Monypenny*, under the deed of 10th June 1835, took an annuity of 300*l.*, liable in the same manner to be defeated by those having title adverse to *Phillips Monypenny*. Sixth, We are of opinion that at the testator's death the coheirs in gavelkind took the fee simple of the estate in question by descent, subject to the life estates given to the said testator's widow and to *Phillips Monypenny* and his eldest son.—Signed, *Fred. Pollock, J. Parke, R. M. Rolfe, T. J. Platt.*"

A full report of the Case, as heard before the Court of Exchequer, will be found in the 16th Volume of Messrs. *Meeson & Welsby's* Reports, page 418.

The cause came on again to be heard before the Vice-Chancellor *Wigram*, on the 19th and five following days of *April* 1847, for further directions on the certificate; and by an order made the 7th *May* 1847, a Case and Supplemental Case were directed for the opinion of the Judges of her Majesty's Court of Common Pleas.

The Supplemental Case related to another part of the *Maytham Hall* property, called the *Lower Maytham Hall* estate,

estate, which the testator had devised separately to the use of his brother *Phillips Monypenny* for life without impeachment of waste, and after the determination of that estate by forfeiture or otherwise in the life of *Phillips Monypenny*, to trustees to preserve contingent remainders, remainder to the uses declared in the will concerning the *Maytham Hall* estate; and by his codicil of the 25th *July* 1818, he repeated the same language with reference to the *Lower Maytham Hall* estate as he had used with reference to the *Maytham Hall* estate, only substituting the words "*Lower Maytham Hall*" for the words "*Maytham Hall*." The circumstances and statements above detailed in reference to the *Maytham Hall* estate applied equally to the *Lower Maytham Hall* estate.

1852.  
  
 MONYPENNY  
 v.  
 DEBING.

The questions on the Case and Supplemental Case directed to the Court of Common Pleas, were the same as those sent to the Court of Exchequer, except that for the words "devised property" in the latter Case, were substituted the words "*Maytham Hall* property" in the original, and "*Lower Maytham Hall* property" in the Supplemental Case submitted to the Court of Common Pleas, and except also that in the Supplemental Case an estate to the use of trustees to preserve contingent remainders was interposed immediately after the life estate of *Phillips Monypenny*.

The Case and Supplemental Case were argued before the Judges of the Court of Common Pleas in *Hilary* Term 1849, and their Lordships gave the following certificate dated the 12th *January* 1850:—"This Case has been argued before us by Counsel. We have considered, and are of opinion as follows:—First, We are of opinion that *Phillips Monypenny* took an estate for life in remainder after the life estate of the widow *Mary Monypenny*. Second, We think that *Thomas Gybbon Monypenny*

1852.  
 MONYPENNY  
 v.  
 DERING.

*Monypenny* took an estate for life in remainder after the life estate of *Phillips Monypenny*, contingent on *Phillips Monypenny* not leaving any issue at his decease and determinable on his *Thomas Gybbon Monypenny* becoming entitled to the estates of *Elizabeth Jodrell*, and also a remainder in tail general after the estate tail of *Robert Thomas Gybbon Monypenny*. Third, We think that *Robert Thomas Gybbon Monypenny* took a contingent remainder in tail male after the termination of the life estate of his father. Fourth, We think that *Phillips Monypenny* acquired no estate or interest under the recovery. Fifth, We think that *Susannah Monypenny* took no estate or interest under the deed. Sixth, We think the coheirs in gavelkind took a remainder in fee after the several estates above mentioned.—Signed, *W. H. Maule, C. Cresswell, E. V. Williams.*”

The cause again came on to be heard before the Vice-Chancellor *Wigram* on the equity reserved, and was argued at great length during several days in *February* and *March* 1850. On the 16th *April* 1850, his Honor delivered judgment, and held, agreeing with the certificates made by both Courts, that *Phillips Monypenny* took an estate for life only; and held further, agreeing with the certificate made by the Court of Common Pleas, that *Thomas Gybbon Monypenny* took an estate for life in remainder after the life estate of *Phillips Monypenny*, contingent on *Phillips Monypenny* not leaving any issue at his decease, and determinable on his (*T. G. Monypenny*) becoming entitled to the *Jodrell* estates; and held further that the Plaintiff *Robert Thomas Gybbon Monypenny*, the son of *Thomas Gybbon Monypenny*, took a contingent remainder in tail after the determination of the life estate of his father.

Upon speaking to the cause upon minutes, the Plaintiff,

1852.  
 MONYPENNY  
 v.  
 DERING.

and the Master further found that *Thomas Gybbon Monypenny* did, upon the decease without issue of *Sylvestra Hutton*, become entitled in possession to the whole of the real and copyhold estate of *Elizabeth Jodrell*, and that he became so entitled under the limitations of the will of *Elizabeth Jodrell*; and he found the execution of the indentures of the 3rd and 4th *October* 1837, as hereinbefore mentioned.

To these several findings of the Master, the Defendant *Robert Phillips Dearden Monypenny* excepted; and on the 18th *July* 1851, the suit came on to be heard before the Vice-Chancellor *Knight Bruce* upon these exceptions and for further directions, when his Honor overruled the exceptions, and made an order (being the second order now appealed from) declaring that, on the death of *Phillips Monypenny* the Plaintiff became absolutely entitled to the *Maytham Hall* estate as equitable tenant in tail, and that he was then entitled to the possession of the same accordingly.

From this order, and the former order of the 7th *May* 1850, the Defendant *Robert Phillips Dearden Monypenny*, together with *Susannah Monypenny*, now appealed to the Lord Chancellor, submitting by their petition that the order of the 7th *May* 1850 was erroneous and that the Plaintiff's bill ought to be dismissed, inasmuch as, according to the true construction of the will and codicil of *James Monypenny*, *Phillips Monypenny* upon the decease of the widow of *James Monypenny* took either an estate in tail in possession, or an estate for his life in possession with a subsequent remainder to himself in tail, and that in either case the recovery suffered by *Phillips Monypenny* was valid and effectually barred all the limitations in the will contained to *Thomas Monypenny* the grandfather of the Plaintiff *Robert Thomas Gybbon Monypenny* and

1852.  
 MONYPENNY  
 v.  
 DERRING.

*Monypenny* had either no estate or interest at all, or at any rate no present estate or interest, in the premises.

Three other of the Defendants to the suit, namely, *J. J. Monypenny*, *P. Monypenny*, and *W. B. Monypenny*, also appealed against the said orders, claiming to be entitled to take a share of the property in question as heirs in gavelkind of *James Monypenny*, and submitting that it ought to have been declared that all the limitations of *James Monypenny's* will subsequent to the limitation to the first son of *Phillips Monypenny* for his life were void, and that, upon the death of *Phillips Monypenny* without having any son, the heirs in gavelkind of *James Monypenny* became entitled.


The two appeals now came on to be heard before the Lord Chancellor.

Mr. *Wigram*, Mr. *Rolt*, and Mr. *C. Hall*, for the Plaintiff, supported the orders appealed from.

The case of the Appellants, who rely on the validity of the recovery suffered by *Phillips Monypenny*, depends upon establishing that *Phillips Monypenny* took an estate tail under the limitations in the will of *James Monypenny*. The Plaintiff, on the other hand, insists, in conformity with the certificates of the Courts of Exchequer and Common Pleas, that *Phillips Monypenny* took an estate for life only. No express estate tail is given to him by the will, and the testator evidently knew how to give such an estate where he desired to do so. The Appellants, however, contend that *Phillips Monypenny* took an estate tail by operation of the doctrine of *cy pres*. This argument was well disposed of by the Court of Exchequer, which in effect held that the doctrine was applicable only for the purpose of keeping an estate in the line of devolution pointed out by the  
 testator,



~~testator~~, whereas to apply it here would be to carry the ~~estate~~ in a different line. The Court of Common Pleas ~~entirely~~ agreed in this view of the law, which, as applicable to the present case, derives additional force from ~~the~~ tenure of the lands in question being gavelkind. The ~~decision~~ in *Nicholl v. Nicholl* (a), is referred to by the ~~Appellants~~, but it was treated by the Court of Exchequer ~~as~~ carrying the application of the doctrine of *cy pres* beyond what appeared to be right, and the report of the ~~case~~ is evidently too unsatisfactory to be relied on as an ~~authority~~. (They here referred to *Seaward v. Willock* (b)).

1852.  
  
 MONYPENNY  
 v.  
 DERING.

The Appellants further contend, that *Phillips Monypenny* took an estate tail by implication, arising out of ~~the~~ form of the gift over in default of issue. This, the Plaintiff insists cannot be, because to imply an estate tail in *Phillips Monypenny* would, as effect must be given to the clearly expressed limitations, be to imply an estate tail in remainder after limitations which are void, ~~n~~ other words to imply a void limitation, which the Court will not do. (They cited *Lethieuillieur v. Tracey* (c), referring to *Bamfield v. Popham* (d)).

The Appellants also rely on the general intention supposed to be apparent on the will; but this, it is submitted, is too vague and uncertain to have effect given to it, and it is not the course of the Court to apply the rule of implication in favour of a general intention against particular limitations which are clearly and precisely expressed. (They cited *Mortimer v. West*, (e), *Doe v. Gallini* (f), *Montgomery v. Montgomery* (g), *Blackborn v.*

(a) 2 *W. Bl.* 1159.

(b) 5 *East*, 198.


(c) 3 *Atk.* 793.

(d) 1 *P. W.* 54.

(e) 2 *Sim.* 274.

(f) 5 *B. & Ad.* 621; 3 *A. & E.* 340.

(g) 3 *Jones & Lat.* 47.

1852.  
  
**MONYPENNY**  
 v.  
**DERING.**

*born v. Edgley (a), Ellicombe v. Gompertz (b), Morse v. Lord Ormonde, (c), Baker v. Tucker (d), Stanley v. Leonard (e), Turke v. Frencham (f).*

The Plaintiff claims under the alternative limitations over to the family of *Thomas Monypenny*, and as against the heirs in gavelkind, who contend that these limitations are void for remoteness, submits that one of the alternatives being unquestionably not too remote, the limitation over is valid, *Longhead v. Phelps (g)*.

They also contended that the decision of the Vice-Chancellor *Knight Bruce* relative to the shifting clause in the will of *Elizabeth Jodrell* was correct.

The cases of *Pitt v. Jackson (h), Somerville v. Lethbridge (i), Jesson v. Wright (k), Langston v. Langston (l), Cambridge v. Rous (m), Doe v. Selby (n), Mellish v. Mellish (o), Chorlton v. Craven (p) Leake v. Robinson (q), Vanderplank v. King (r)*, were also cited and commented on in the course of the argument.

Mr. *Walker* appeared for *Thomas Gybbon Monypenny* the father of the Plaintiff, but took no part in the discussion.

Mr. *Malins* and Mr. *Faber* on behalf of one of the  
 Appellants,

(a) 1 *P. W.* 600.

(b) 3 *Myl. & Cr.* 127.

(c) 5 *Madd.* 99; 1 *Russ.* 382.

(d) 3 *H. L. Ca.* 106.

(e) 1 *Eden*, 86.

(f) *Dyer's Rep.* 171.

(g) 2 *W. Bl.* 704.

(h) 2 *Bro. C. C.* 51.

(i) 6 *T. R.* 213.

(k) 2 *Bli.* 1.

(l) 8 *Bli. N. S.* 167.

(m) 8 *Ves.* 12.

(n) 2 *B. & C.* 926.

(o) 2 *B. & C.* 520.

(p) Cited 2 *B. & C.* 524.

(q) 2 *Mer.* 363.

(r) 3 *Hare*, 1.

**Appellants**, the Defendant *Robert Phillips Dearden Monypenny*, supported the title of *Phillips Monypenny*.

1852.

MONYPENNY  
v.  
DERIN G.

Our point is, that the general effect of the will of *James Monypenny* is that *Thomas Gybbon Monypenny* shall not take till all issue of *Phillips Monypenny* are exhausted; and the difficulty we have to contend with, and which has been pointed at by the other side, is that the interposed limitations are void, and that therefore the limitation over on which we rely must be void also. We submit, however, that there is no authority for holding that such will be the effect of the interposed limitations; for admitting the general rule to be that a void limitation will avoid all limitations coming after it, yet an estate tail in remainder to the ancestor is an exception; *Doe v. Applin* (a), *Doe v. Cooper* (b), *Seaward v. Willock* (c), *Mortimer v. West* (d), *Brooke v. Turner* (e), *Toller v. Attwood* (f). With regard to the alternative form of the gift over, it does nothing more than point to the regular determination of the estate tail; *Driver v. Edgar* (g), *Fountain v. Gooch* (h). The will may be read as limiting a contingent remainder to the sons &c. of *Phillips Monypenny*, the contingency to be determined at the death of *Phillips Monypenny*; and such a remainder could not be void for remoteness, *Cole v. Sewell* (i).

With regard to the shifting clause in *Elizabeth Jodrell's* will, we submit that it did not operate, because by means of the recovery suffered by *James Monypenny*,  
*Phillips*

(a) 4 T. R. 82.

(b) 1 East, 229.

(c) 5 East, 198.

(d) 2 Sim. 274.

(e) 2 Bing. N. C. 422.

(f) 15 Q. B. Rep. 929.

(g) Cowp. 379.

(h) 5 Buc. Abr. Tit. Legacies and Devises (D.) p. 38.

(i) 4 Dru. & War. 1.

1852.  
 MONYPENNY  
 v.  
 DERING.

*Phillips Monypenny* came into possession of the *Maytham Hall* estate by purchase, and not by any course of succession existing at the time of *Elizabeth Jodrell's* will; *Fazakerly v. Ford* (a), *Taylor v. Earl of Harewood* (b).

With regard to the shifting clause in the will of *James Monypenny*, the Plaintiff relies on it as operating on the death of *Phillips Monypenny* without issue, so as to cause the *Maytham Hall* estate to shift from the Plaintiff's father (*T. G. Monypenny*) to the Plaintiff. This however we deny, and contend that the clause had previously operated on the estate, and could not become operative a second time. Whether this was so or not, we further urge that it did not operate, because when *T. G. Monypenny* came into possession of the *Jodrell* estate he did not do so under limitations in the will of *Elizabeth Jodrell* subsisting at the date of *J. Monypenny's* will, but under the recovery suffered by him and *Sylvestra Hutton*.

Mr. *Bethell* for another Appellant, *Susannah Monypenny*, was about to address the Court when the Lord Chancellor requested that Mr. *Wigram* would first reply on the point relative to the shifting clauses.

Mr. *Wigram* replied accordingly, and in reference to the cases of *Fazakerly v. Ford* (a), and *Taylor v. Earl of Harewood* (b), submitted that the present case was distinguishable, inasmuch as the estates for the devolution of which the clause in question provided were not in settlement at the time. He further submitted, that there was no reason for limiting the operation of the shifting clause relating to the *Maytham Hall* estate to one occasion only.

Mr.

(a) 4 *Sim.* 390.

(b) 3 *Hare*, 372.

**Mr. Bethell** then proceeded with his argument on behalf of *Susannah Monypenny*.


1852.  
  
 MONYPENNY  
 v.  
 DERING.

He supported generally the argument addressed to the Court on behalf of *Robert Phillips Dearden Monypenny*, and then added:—There is another view which may be taken of the limitations contained in the will of *James Monypenny*, which is this: not looking only at the particular words of the limitation but at the entire will, a clear intention is seen that all the issue of *Phillips Monypenny* shall take before *Thomas Monypenny* and his family; the whole class, however, of this issue is not directly provided for in the limitations: this is evidently a mistake, and it is submitted that the rule applicable to such a case is, that where there is an intention to give to the issue of a particular person an estate which by law cannot be enjoyed or received by that person, and an estate is previously given to the father of that person, the Court will give to the father such an estate as will afford to the issue of the son the best chance of taking. Applying this rule to the present case, it is submitted that *Phillips Monypenny* ought to be regarded as taking an estate tail general. (He referred to the several cases before mentioned, and cited also 8 *Vin. Abr. Tit. Devise*, p. 233, and *Dubber v. Trollope* (a).)

*Mr. Willcock* and *Mr. F. T. White*, for the heirs in gavelkind.

They insisted that the arguments severally addressed to the Court on behalf of *Robert Phillips Dearden Monypenny* and *Susannah Monypenny* were inconsistent with each other, and were both irreconcilable with the intention of the testator; that this intention was apparent, namely, to keep the estate united in one individual; that in attempting

(a) 1 *Amb.* 453.

1852.  
  
**MONYPENNY**  
 v.  
**DEBING.**

attempting to accomplish this, he had gone further than the law allowed; and, that in consequence, the heirs became entitled. They argued, that the fact of the tenure of the land being gavelkind must be assumed to have been known to the testator, and was to be taken into account in dealing with the question of construction. They referred to several of the authorities before cited, and quoted also from *Sugd. Powers*, Vol. II. p. 65, ed. 6, and *Fearne Cont. Rem.*, p. 522.

Mr. *Collins* and Mr. *Bagshawe* appeared for other Defendants, but took no part in the discussion.

[The *Lord Chancellor*.—In *Cole v. Sewell* (a) I said that the rule against a limitation to an unborn son of an unborn son was unaffected by what I there laid down.]

Mr. *Wigram* then replied on the principal point, namely, the estate taken in the premises by *Phillips Monypenny*.

*The* LORD CHANCELLOR.

As I entertain no doubt upon the principal question in this case, which is, however, one of great importance and has been exceedingly well argued before me, I shall at once dispose of the matter upon that point. With regard to the other question, arising upon the shifting clauses, it is requisite that I should see the papers and consider the facts more carefully, and I shall therefore postpone deciding upon it until to-morrow morning.

The will upon which the question I am now going to decide arises, though an unusual one, is very plain, and, as far as mere language goes, admits for the greater part of no dispute. However singular it may be, the testator  
 for

(a) 4 *Dru. & War.* 1.

1852.

MONYPENNY  
v.  
DERING.

for some reason or other seems to have had a great desire to provide only for the first son of the person to whom he was giving property. Thus, in one part of the will he gives a certain estate to the use of one of his nephews for life, and then for the first son of the body of that nephew and the heirs male of the body of such first son, and there he leaves off; and again in like manner he gives another property to another nephew for life, and to the first son of the body of that nephew and the heirs male of his body, thus making it clear that as to those two estates he did not intend to provide for any person except the first son of the devisee and the heirs male of the body of such first son. This, however, does not immediately relate to the question which arises on the general gift, with which I have now to deal. By it the legal fee is given to trustees, and they are to raise money for the payment of debts, and then the testator limits the estates (the *Maytham Hall* and residuary real estate) in trust for his brother *Phillips Monypenny* for life without impeachment of waste, then in trust for the first son of the body of *Phillips Monypenny* for his life, then "immediately after his decease upon trust for the first son of the body of such first son and the heirs male of his body, and in default of such issue, upon trust for all and every other the son and sons of the body of my said brother *Phillips Monypenny* severally and successively according to seniority of age, for the like interests and limitations as I have before directed respecting the first son and his issue; and in default of issue of the body of my said brother *Phillips Monypenny*, or in case of his not leaving any at his decease, upon trust for my said brother *Thomas Monypenny* for and during the term of his natural life without impeachment of waste, and from and immediately after his decease upon trust," &c.

Stopping here for a moment, and without including the gift

1852.  
MONYPENNY  
v.  
DERING.

gift over, ("and in default of issue of the body of my said brother *Phillips Monypenny*," &c.), the limitations, if construed as they stand, would, without any aid from rules of law and attending merely to the construction, admit of no doubt. If the issue of *Phillips Monypenny* had been born in the lifetime of the testator, the devise would have been valid; but *Phillips Monypenny* never had any issue, and with regard to him no one is provided for but his first unborn son and the first unborn son of that unborn son and the heirs male of the body of that son; the limitation in default of such son being to all other the son and sons of *Phillips Monypenny* in like manner. Then the rule of law forbids the raising of successive estates by purchase to unborn children, that is, to an unborn child of an unborn child. With this rule I have never meant to interfere, for it is too well settled to be broken in upon; and the result therefore is, taking the limitation as it stands, that there is a good life estate to *Phillips Monypenny* and to his first unborn son if he had one, and that the remainder to the other sons and their issue is absolutely void, as being upon too remote a contingency.

As regards the construction, independently of other questions and merely desiring to see whether it was intended to provide for other sons of the first son beyond a first son, one cannot fail to be struck with the words used by the testator. The gift is upon trust for the first son of the first son and his heirs male, and in default of such issue, not on trust for all and every other the son and sons of the body of such first son, but on trust "for all and every other the son and sons of the body of my said brother *Phillips Monypenny*." Thus, as I observed in the course of the argument, if the testator intended to provide for the other sons of a person for whose first son he had provided, he knew perfectly well how to do it.



~~it.~~ He does it in clear and express words in reference ~~to~~ the other sons of *Phillips Monypenny*, for whose first ~~son~~ he had provided; but having provided for the first ~~son~~ of the first son of *Phillips Monypenny*, he does not ~~in~~ any manner provide for the other sons of that first ~~son~~. If he meant to provide for the other sons it is ~~singular~~ singular that he should not have done so; and I therefore think that by construction it would not be possible ~~to~~ raise estates in their favour. The result is that, ~~taking~~ taking the will as it stands, there is no doubt that the ~~whole~~ whole limitations, after the first life estate to the first ~~unborn~~ unborn son of *Phillips Monypenny*, are void.

1852.  
 MONYPENNY  
 v.  
 DERRING.

But it has been argued, that I can adopt a construction of this will which would give effect to the whole of ~~what~~ what is taken to be the intention of the testator,—in the first place by means of the doctrine of *cy pres*, next by construction, and thirdly, by the rule which gives to a general intent a preference over a particular intent. In order to get at the intention of the testator, I must look at the terms of the will, and I find they are, that, “in default of issue of the body of my said brother *Phillips Monypenny*, or in case of his not having any at his decease,” then there is a gift over. In an ordinary case, and not regarding for the present the alternative form of the gift over or the question of remoteness, the words used would by construction give an estate tail to *Phillips Monypenny* himself. Some of the issue of *Phillips Monypenny* being provided for, and *Phillips Monypenny* himself having a life estate, and then the estate being given over in default generally of issue of *Phillips Monypenny*, the true construction would, I think, be that the testator intended to provide that the estate should not go over until there was a general default of the issue of *Phillips Monypenny*; and if so, the words would have a double operation, first to raise an estate

1852.

MONYPENNY

v.

DERING.

estate tail, and secondly to create a remainder over on that estate tail. In that way, though not immediately according to *The Attorney-General v. Sutton* (a) and that class of cases, while the express limitations of the will would be left to operate in the mode in which they are directed, all the issue of this particular person would, although in remainder, be provided for. Then, reverting to the will, the testator limits the estate in trust for his brother *Thomas Monypenny* for life, and immediately after his decease for *Thomas Monypenny* the eldest son of his brother for his life, "and from and immediately after his decease upon trust for the first son of the body of the said *Thomas Monypenny* son of my said brother *Thomas Monypenny*, and the heirs male of his body," thus creating here an estate tail, "and in default of issue of the body of the said *Thomas Monypenny* the son, upon trust for all and every other the son and sons of the body of my said brother *Thomas Monypenny* for the like estates," &c. Here it is quite clear that the words of the gift over would give to *Thomas Monypenny* an estate tail in remainder, expectant on the estate tail to his son; and in that way all the intention of the testator would be effected as regarded the issue of *Thomas Monypenny*. Looking, therefore, at the whole frame of this will, there is certainly some ground to suppose that the testator did fancy, inartificial as the limitations are, that he had provided for all the issue of *Phillips Monypenny*; but whether that can be effected according to the rules of law or not is now the point to be considered.


In the first place, it is said that I am to effectuate this intention by means of the doctrine of *cy pres*. This doctrine, as I understand it, is nothing more than that  
which

(a) 3 Bro. P. C. 75; 1 P. W. 754.

which prevails in other cases of giving effect to the general intent, but with this difference, that it is not, as in them, carried into effect at the expense of the particular intent. In the common case there is a valid particular intent and there is a valid general intent, and the particular intent not in the view of the Court effectuating all the intentions which they presume the testator to have had, they look to his general intent, and they effect his general intent at the expense of his particular intent. In applying, however, the doctrine of *cy pres*, nothing is sacrificed; for example, in the case of limitations under powers, where there is a good gift of a limited estate to a person an object of the power and then a gift over to his children who are not objects of the power, effect may be given to the whole intention by giving to the parent an estate of inheritance by means of which the estate will descend to his children. In such a case, no doubt, the general intent is effectuated, but it is done at no expense of the particular intent, because there is no valid particular intent to which effect can be given. So in the case, more closely applying to that now before the Court, of a limitation to an unborn son for life, with remainder to his unborn children in tail, where, as effect cannot be given to the expressed intention, because successive estates cannot be limited to an unborn person and to his issue, an estate tail is given to the party to whom the limitation was made for life: here, again, the particular intent is not sacrificed, but effect is given to it as a general intent.

Some doubt has, in the course of the argument, been thrown on the authority of *Pitt v. Jackson* (a), and I am sorry for it, because I have always believed that case to be recognised, and have always held it to be law; and I may mention, as showing the view I entertain of it, that,

(a) 2 Bro. C. C. 51.

1852.  
  
 MONYPENNY  
 v.  
 DERING.

1852.  
  
**MONYPENNY**  
 v.  
**DERING.**

that, when in *Ireland*, I followed it in deciding the case of *Stackpoole v. Stackpoole* (a). In *Routledge v. Dorril* (b), Lord *Alvanley* also states his view of the case; for after mentioning that the doctrine there laid down had been questioned, he says, “I subscribe to the case of *Pitt v. Jackson*, as far as it was decided with regard to a real estate settled to a person who was an object of the power, for life, with limitations in strict settlement to persons not objects of the power: for that was decided in *Humberston v. Humberston*, 1 *P. W.* 332, and *Spencer v. Duke of Marlborough*, 5 *Bro. P. C.* 592.” Afterwards, speaking of *Chapman v. Brown* (c), which depended upon the omission of a line by accident, Lord *Alvanley* says, “I remember attending the argument of that case in the Court of King’s Bench and in the House of Lords . . . they did seem to avoid giving an opinion upon that point. But it is equally clear according to the report, that Lord *Mansfield* laid down that doctrine, and I do not find much objection to it, viz., that where there is a limitation for life to a person unborn with remainders in tail to the first and other sons, as they cannot take as purchasers, but may as heirs of the body, and as the estate is clearly intended to go in a course of descent, it shall be construed an estate tail in the person, to whom it was given for life.” Supposing, then, that the *cy pres* doctrine is not to be applied to the case before me, it must be upon this ground and this ground only, that although the doctrine may be applied to cases where the intention of the testator is not by such application carried into effect because that intention was illegal, yet it must be so applied in favour of a class intended to be provided for by the testator. I apprehend the rule is this, that neither by implication, nor by the doctrine of *cy pres*, can an estate be

(a) 4 *Dru. & War.* 320.

(b) 2 *Ves. jun.* 357, 364.

(c) 3 *Burr.* 1626.

be carried to a class, or a portion of a class, for whom the testator never intended to provide. For persons for whom the testator did intend to provide, a different provision may indeed be made, as was done in the case of *Pitt v. Jackson*: there the estate was intended to go to the children as purchasers as tenants in common, but it was not within the power of the testator to give them that estate, and the Court therefore would not raise it, but it raised an estate which, although it would not go *modo et forma* as the testator had provided, would go to all the class for whom he intended to provide.

1852.  
  
 MONYPENNY  
 v.  
 DERING.

As to *Nicholl v. Nicholl* (a), I am very much disposed to think that it is not open to the criticism which was made upon it in this case in the Court of Exchequer, for it appears to me as if in *Nicholl v. Nicholl* the Court had seen upon the whole of the will that the second son of the second son was only intended to be excluded in case the paternal estate devolved on him, and that they also collected an intention to provide for everybody else; and accordingly we find that the second opinion which the Judges gave was this, "We are also of opinion that, in order to effectuate the general intent of the deviser, such second son will take an estate to him and the heirs male of his body, determinable on the accession of the paternal estate." It is certainly a singular case, and the construction put upon the devise a very bold one; but I do not apprehend that the Court meant to introduce, or that they did in fact by the doctrine of *cy pres* introduce, any person or class of persons for whom the testator did not intend to provide. I think, therefore, that *Nicholl v. Nicholl* is not an authority against the decision of the Court of Exchequer in the present case.

Applying

(a) 2 *W. Bl.* 1159, 1162.

1852.

ANTYPENNY  
v.  
DERING.

Applying then the rule I have stated to the limitations now under consideration, I think that I am not at liberty to disregard the clear words of the testator, which I am perfectly satisfied he meant to use according to their import, although he may possibly have also meant something else, which he has not sufficiently expressed. Being clear that he meant both to give the estate to his brother for life and to the first son of his brother for life and to the first son of that first son and the heirs male of his body, and also that he meant nothing to interfere with that disposition, I cannot by the doctrine of *cy pres* include any limitations which would provide for the second and other sons of the first grandson, contrary to the words of the will; and I am therefore of opinion that the doctrine does not enable me to give effect to any supposed intention of the testator beyond the clear expressions contained in his will.

I may here dispose of the third point submitted to me, namely, that I can give effect to the assumed intention by means of the doctrine of providing for the general intention at the sacrifice of the particular intention. There is no case that was ever decided, that I am aware of, that would enable me on that doctrine to cut down the clear estate in tail male given by this will to the first grandson. If the child had been born in the testator's lifetime, neither I nor any other Judge would have a right to say that the testator might not give the estate to his brother for life, to his brother's first son for life, and to the first son of that son and the heirs male of his body. On the face of them the limitations are valid, they are also unambiguous, and require no aid whatever from any rules of construction; and I cannot, therefore, on the ground of a general intention, affect them.

The question then arises, whether I can in any other way

way effectuate what is supposed to be the general intent. Immediately after the limitation just considered, the testator gives the estate, "for all and every other the son and sons of the body of my said brother *Phillips Monypenny* severally and successively according to seniority of age for the like interests and limitations as I have before directed respecting the first son and his issue."

The words here are also express and plain, and I do not see how I can, on the ground of a general intent, cut down this particular limitation and exclude the second and other sons of the brother *Phillips Monypenny*, to whom the testator has expressly given the estate on failure of the heirs male of the body of the first grandson. I had occasion to review the authorities on this point in the case of *Montgomery v. Montgomery (a)*, and I took great care in going through them to see what the rule really was. Although always willing to give effect to the general intention when I can do so without unreasonably and improperly destroying a particular intent, I there found myself bound to give effect to the particular intent which, though not embracing everything, embraced a great deal, and gave a proper legal operation to the will according to the expressed intention of the testator. By that rule I desire to abide, being ready to give effect to the general intent, and even to sacrifice to it a particular intent if requisite, but not doing so without an actual necessity.

It has also been argued here very ingeniously, that wherever you find an estate tail given to the parent, either under an actual limitation which would admit of no difficulty, or by implication (as, for example, to *A.* and if he dies without issue to *B.*, where an estate tail arises by implication from the gift over), if the preceding

or

(a) 3 *Jones & Lat.* 47.

1852.  
 MONYPENNY  
 v.  
 DERING.

or following limitations in the will are to the children of that person, they may be rejected, and that it is utterly unimportant that successive estates are by these limitation attempted to be raised which would be void for perpetuity. I know of no such rule, and must deny that any such exists.


Two cases were, however, cited in support of the argument. One was *Seaward v. Willock* (a), in which there was nothing but the devise of successive estates for life, which were held to be void, the successive estates which were given were not followed by any other limitation; and I understand the argument with which I am now dealing to depend on what was said by Lord *Ellenborough* in delivering the judgment of the Court. After holding the successive estates to be void, he cites various cases, and says, "In all these cases expressions were used denoting an intention that the lands should continue in the descendants of the first taker as long as there were any, without specifying or marking what estates such descendants should take: but in this case the deviser has not used general terms, from whence an intent to give a descendible estate to the issue of the first devisee may be collected; but has in express terms narrowed the estates which the issue were to take to estates for life: and this, properly speaking, is not a case of a particular and a general intent, both of which cannot be effectuated, and where the one must give way to the other; but a case of single intent to create, as I have said, a succession of estates for life not warranted by law: we do not, therefore, feel ourselves warranted by any rules of construction to say that under this devise *Thomas Southcomb*, the bankrupt, took any greater estate than for his life." I, however, think that this, so far from

sustaining

(a) 5 *East*, 198, 207.



sustaining the argument, is rather the other way, and tells against it. The other case referred to was *Mortimer v. West* (a), before the Vice-Chancellor, in which, though there were void estates for life, his Honor relied upon a general gift over (whether properly or not I need not now consider); but it is no authority on which I can act for the general proposition, which I do not think can be maintained.

1852.  
  
 MONYPENNY  
 v.  
 DERRING.

I do not mean to say, that if I could see a clear general intention to provide for the issue in a way in which effect could be given to it, and a superadded intention to provide for that issue in a manner not allowed by law, I might not in such a case reject that which was illegal, and give effect to that which was legal; and what now falls from me must not, therefore, be considered as an expression of opinion that cases may not exist in which a limitation to issue void for remoteness may not be properly rejected, and the legal intention effectuated by giving an estate tail to the parent. I cannot, however, do this in the case before me: I cannot give the estate to the father in possession, for that would clearly not effect the intention, and I cannot give it to him in remainder expectant on the void estates, for that would immediately expose it to the same objection as the preceding estates, and render it equally void with them.

I now come to the argument raised upon the question of construction simply. It is said, that if I could give to the first son of the body of the first son, that is, to the grandson, of *Phillips Monypenny*, an estate tail, then the other estates would naturally follow under the actual gifts of the will. That is certainly the most reasonable construction that could be adopted of this will, and one which would do less violence to the terms used than any other.

(a) 2 Sim. 274.

1852.  
 MONYPENNY  
 v.  
 DEBING.


other. If, therefore, I could adopt it, I would ; but I cannot do so consistently with the words of the will ; for, in the first place, I must not only introduce lines of issue for whom the testator has not provided, but I must exclude and postpone lines of issue for whom he has expressly provided. I must not only introduce second and other sons of the first son, but I must exclude until they or all those so introduced are dead without issue, the second and other sons of *Phillips Monypenny* ; this I am not at liberty to do. I am therefore of opinion, with regard to the construction of this will, that I cannot give any other than the general legal construction to the limitations ; the consequence of which is, that *Phillips Monypenny* took a good estate for life, and his first unborn son, if he had been born, would have taken a good estate for life, and that all the remainders over, so far as they are remainders over, are void and inoperative and cannot be considered as standing in the way of any body who is entitled otherwise in this property.

This brings me to the clause containing the gift over, and a very important question is certainly raised on that clause. After having provided for the unborn children and issue of unborn children of *Phillips Monypenny*, the testator says, " And in default of issue of the body of my said brother *Phillips Monypenny*, or in case of his not leaving any at his decease, upon trust for my said brother *Thomas Monypenny* for and during the term of his natural life," &c. If this was a regular remainder, depending upon the previous limitations, it would of course be open to the same objections as those limitations, and those limitations being void it could not take effect.

The law, as to this part of the case, stands in a peculiar position. The case of *Longhead v. Phelps* (a) shows


(a) 2 W. Bl. 704.

shows that where there are two clauses containing a gift over, the first being a good gift over on a particular event, and the second being one which would be too remote and therefore void, advantage may be taken of the former without any notice being taken of the latter clause. The point did not arise in the case just mentioned on a gift over following any disposition illegal on account of perpetuity; but it did so arise in a very important case which was not cited, and which was very much agitated both in this Court and the Courts of Common Law, I mean *Beard v. Westcott* (a). There were in that case successive life estates for terms of years to the testator's grandson and his unborn issue (as in *Somerville v. Lethbridge* (b)), which were clearly void beyond the first son, and then followed a disposition to this effect, "And in case there shall be no issue male of the same *John James Beard* (the testator's grandson), nor issue of such issue male at the time of his death, or in case there shall be such issue male at that time, and they shall all die before they shall respectively attain their respective ages of twenty-one years without lawful issue male," then the estate was to go over. The case was sent to the Court of Common Pleas, and they were of opinion (that part of the case is cited in a note to *Gilbert on Uses*, p. 270) that the several gifts after the gift to the unborn son of the grandson were void, but they were also of opinion, that if the event mentioned arose, the gift over would take effect, the event in question being within the legal limits of perpetuity. With this decision I could not agree, and for this reason, that the testator never meant that the gift over should take effect unless the parties interested under the previous limitation if they had lived were capable themselves

1852.  
  
 MONYPENNY  
 v.  
 DERING.

(a) 5 Taunt. 393; Turn. & R. 25.

(b) 6 T. R. 213.

1852.  
  
 MONYPENNY  
 v.  
 DEBING.


themselves of taking, and that consequently the gift over must be void. Having had great difficulty in prevailing on Sir *William Grant* to send the case to the Court of Common Pleas originally, and that Court having decided that the consideration I have just stated did not affect the validity of the gift over, I applied to and prevailed on Lord *Eldon* to send a case to the Court of King's Bench. That Court held that the gift over was void, not because it was not within the line of perpetuity, but expressly on the ground I have adverted to, namely, that that limitation over was never intended by the testator to take effect, unless the persons whom he intended to take under the previous limitation would if they had been alive been capable of enjoying the estate, and that he did not intend that the estate should wait for persons to take in a given event, where the person to take was actually in existence but could not take; and Lord *Eldon* affirmed that decision (a). This shows that where there are gifts over which are void for perpetuity, and there is a subsequent and independent clause on a gift over which is within the line of perpetuities, effect cannot be given to such a clause unless it will dovetail in and accord with previous limitations which are valid. This reasoning will apply to the case before me in this manner; if the gift in question can be read as a gift in the alternative, that in case there is no issue living at the death of the brother the estate is to go over, then effect may be given to it consistently with *Beard v. Westcott* and every other authority, because the estate over would not be carried under the limitation at the expense of any person whom the testator intended to take, and no objection on this ground could consequently be raised.

The


(a) *Turn. & R.* 25.

The cases with regard to limitations over have also taken another shape. In *Proctor v. The Bishop of Bath and Wells* (a), there was a disposition to the first son of *Thomas Proctor* who should be bred a clergyman and be in holy orders, and if *Thomas Proctor* should have no such son, then over: and there was no son. As the son could not take holy orders until the age of twenty-four, the limitation, taking it as it stood, was too remote; but it was argued, and it might be said reasonably that the limitation over embraced two events, namely, if no son was ever born, or that being born he did not take holy orders, and that the first was perfectly good. The Court, however, held expressly that they could not divide the limitation, saying that they "were clearly of opinion that the first devise to the son of *Thomas Proctor* was void, from the uncertainty as to the time when such son, if he had any, might take orders; and that the devise over, as it depended on the same event, was also void; for the words of the will would not admit of the contingency being divided, as was the case in *Longhead v. Phelps*, 2 Black. 704; and there was no instance in which a limitation, after a prior devise, which was void from the contingency being too remote, had been let in to take effect." Thus the Courts have gone at least to this extent, that they will not hold a gift over made in words comprising only one event as made on two events, although in point of fact it may consist very reasonably of two branches, unless the testator has himself so expressed it. What is contended in the case before me is, that I am to consider the words which at all events point to different events as pointing only to one event. There is no doubt that in the sense in which the words, "and in default of issue of the body," are generally used, they mean a failure of issue at any time, which would of course embrace a failure of issue at any particular time; but then

I find

1852.  
  
 MONYPENNY  
 v.  
 DERING.

(a) 2 H. Bl. 358, 362.

1852.  
  
 MONYPENNY  
 v.  
 DERING.

I find the testator, while using these words, also using words which embrace an event falling within them. I am therefore bound to consider that he did not use the general words in the sense in which the Court would use them, for if he did the other clause would be insensible and inoperative. As, then, I have before refused to add to the words which he has used, so I refuse, and on the same solid ground as it appears to me, to strike out his words, and I feel myself bound to give effect to every word in the will, as far as the law will enable me to do so.

There is also another reason which on this part of the case is quite satisfactory to my mind. Lord *Hardwick* lays it down that it is utterly immaterial what words come first or what words come last in a will, that in fact there is no magic in words; and I am clearly of opinion, therefore, that if there be ambiguity in the clause in question I am at perfect liberty to clear it up, and to read the clause in this way, "And in case of his not leaving any issue at his decease or in default of his issue," meaning "if upon his death" (looking at an event which may soon be ascertained) "he shall leave no issue behind him, or if he do and at any period however remote that issue shall fail, I give the estate in such and such a way." There is nothing at all insensible in this; it may be expressing unnecessarily in the former branch of the clause that which would be included in the latter, but it shows that, unlike the case of *Proctor v. The Bishop of Bath and Wells*, the testator has provided under two forms of expression for what he might have provided under one. I can hardly suppose any clause providing for an event which must happen, but may happen at different periods, that might not be read in the same way: it might be so read in *Leake v. Robinson (a)*, and every other case.

Nothing

(a) 2 Mer. 363.

**N**othing is so dangerous with regard to a man's will as to strike out words which admit of a reasonable interpretation; and I am clearly of opinion that effect must be given to this clause as an independent clause, and that the gifts over are perfectly valid.

1852.  
MONYPENNY  
v.  
DERING.

I shall therefore affirm the decision of the Court below, so far as it relates to the first question in the case; the other point I will, after looking into the materials before me, endeavour to dispose of to-morrow morning.


---

*The LORD CHANCELLOR.*

The case upon the point which now remains to be disposed of is one of considerable difficulty and complication, and I will now state the opinion which I have formed upon it, after having given it that consideration which it ought to receive.

July 20.

By the will of Mrs. *Jodrell*, who died in 1775, the *Jodrell* estate was given to *Mary Jefferson* for life, then to her sons and daughters in tail, then to *Sylvestra Monypenny* for life and her sons and daughters in tail, then to *Phillips Monypenny* for life and his sons and daughters in like manner, and then to *Thomas Monypenny* for life and his sons and daughters in like manner; then there was the shifting clause that, "if the said *Phillips Monypenny* and *Thomas Monypenny* or either of them their or either of their issue male or female, or any other son or sons of the said *James Monypenny*, of *Greenwich*" (who are provided for by her will) "hereafter to be born or his their or any of their issue male or female, shall at any time or times be or become entitled to an estate of freehold or inheritance in possession of or in the messuages lands tenements and hereditaments in the said county of *Kent* now of or belonging to my cousin *Robert Monypenny* Esq.

1852.  
  
 MONYPENNY  
 v.  
 DERING.

Esq. of *Rolvenden* elder brother of the aforesaid *James Monypenny* of *Greenwich* or the greatest part of the same messuages lands tenements and hereditaments, so as to be in the possession or in the actual receipt of the rents and profits thereof," the estate was to shift over.

In regard, then, to the *Jodrell* estate, the shifting clause was to operate in case the parties named became entitled to the *Maytham Hall* estate. I very much doubt, looking at the limitations of the *Maytham Hall* estate at the time that this will was made and the subsequent acts in regard to that estate, whether that estate ever did become vested in a person claiming under the will of Mrs. *Jodrell* in a way to make her estate go over; but this is not important, as, strictly speaking, the question before me does not relate to the shifting of the *Jodrell* estate, but to that of the *Maytham Hall* estate.

The *Maytham Hall* estate was settled after the death of the testator's widow to *Phillips Monypenny* for life, then to his first unborn son, then came the remainder void for perpetuity, and then the gift over, which has been held to be good. The shifting clause was in effect that if the testator's brothers or either of them should become entitled to the *Jodrell* estate, then the next person entitled under the will should take as if the party so becoming entitled were dead.

*Phillips Monypenny* came into possession of the *Maytham Hall* estate on the death of the testator's widow in 1826, having at that time an estate in remainder in the *Jodrell* estate. This, however, could not be held to be within the terms of the shifting clause, as the testator could never have intended that a mere accession to a life estate in remainder, which might never be enjoyed, should take away an estate in possession.



sion. In 1836, however, the event contemplated did happen, when, upon the death of *Sylvestra Hutton*, *Phillips Monypenny* took the *Jodrell* estate; and the *Maytham Hall* estate then went over, and it was to go over as if the party taking were dead. The effect however of what occurred would not be to carry the estate to *Thomas Gybbon Monypenny*, because the death of *Phillips Monypenny* could not have done so; for if there had been a son of *Phillips Monypenny*, he would have taken it, and *Thomas Gybbon Monypenny* never could take unless *Phillips Monypenny* had died without issue living at his death, under the clause which has been sustained by the Court. The consequence is, that *Thomas Gybbon Monypenny* did not, upon the estate going over, acquire an estate for life; but the estate remained in the trustees, for whom I need not now inquire.

1852.  
 MONYPENNY  
 v.  
 DERING.

Then, in 1837, *Thomas Gybbon Monypenny*, *Phillips Monypenny*, and *Sylvestra Hutton*, joined in executing mutual cross conveyances; and I am clearly of opinion that these instruments are binding, and effectually convey whatever estates the parties severally had in the property. *Thomas Gybbon Monypenny* also suffered a recovery of the *Jodrell* estate, *Sylvestra Hutton* and *Phillips Monypenny* joining in the deed making a tenant to the præcipe. *Phillips Monypenny* too suffered a recovery of the *Maytham Hall* estate (which has had no operation), under which he claimed the fee simple, and this recovery was recited in the deed by which *Thomas Gybbon Monypenny* conveyed to him in fee. The effect was in my opinion to pass whatever estate *Thomas Gybbon Monypenny* had, that is, as I have already explained, in consequence of the shifting clause, an estate for life contingent on the event which afterwards happened. This estate he was, I think, capable of transferring

1852.  
 MONYPENNY  
 v.  
 DERING.


ferring and did transfer by the conveyance of 1837 to *Phillips Monypenny*, and the parties who now claim under the will of *Phillips Monypenny* would no doubt be entitled to it.

Then comes this other question ;—when *Phillips Monypenny* died, *Thomas Gybbon Monypenny* became, as the Court has already held, entitled to a life estate in the *Maytham Hall* estate, being also then in possession of the *Jodrell* estate ; did the shifting clause in *James Monypenny's* will operate or not.

One thing is here quite clear, that the conveyance by *Thomas Gybbon Monypenny* passing to *Phillips Monypenny* the life estate in contingency could not prevent that clause from operating ; and I am also of opinion that its operation was not affected by the dealings by *Thomas Gybbon Monypenny* with the *Jodrell* estate. Those dealings left everything as it stood, except that the limited estate of inheritance which *Thomas Gybbon Monypenny* had was enlarged into an estate in fee. I think, therefore, that *Thomas Gybbon Monypenny* did succeed to the *Jodrell* estate in the sense in which the testator, *James Monypenny*, used the expression, and that his dealings with that estate did not prevent the shifting clause from operating.

Looking to the words of the clause, they are no doubt ambiguous, and might mean that there should be only one shifting ; the testator uses the terms of “ then and in that case and immediately upon such an event taking place,” which certainly have a bearing towards the clause operating only once ; but, on the other hand, the express declaration is, that if the said brothers or either of them their or either of their issue shall become entitled to the said estates, then the clause is to operate

operate. I must suppose the testator to have known what the limitations of the *Jodrell* estate were, and that it was settled on his brothers in succession, for he provides expressly for the two events, namely, of both brothers becoming entitled, or either of them becoming entitled; and therefore, when he afterwards seems to confine the clause to but one event, the expression may be a little ambiguous, but there is nothing really insensible or contradictory in it.

1852.  
  
 MONYPENNY  
 v.  
 DEBING.

I think, then, that the true construction is, that this clause is to operate *toties quoties* as regards the particular persons named, and, that being so, the consequence is that in the event which happened the person became entitled who would have taken if the person succeeding to the *Jodrell* estate had been then dead. If *Thomas Gybbon Monypenny* had been then dead, his son, the Plaintiff, would have taken.

The case is exceedingly complicated, and open to very great difficulty; but it appears to me that the decision which has been come to in the Court below is right. If, however, anything occurs to the Counsel for the Appellant upon the case as I have stated it, I shall be very glad to hear them.

---

Mr. *Malins* having declined to offer any further remarks, a discussion then took place in reference to the costs. It was ultimately arranged, with the sanction of the Lord Chancellor, on the understanding that no further litigation was to take place, that the costs of all parties except the heirs, who would bear their own costs, should come out of the fund.

1852.

Nov. 9. 12.

## HARRISON v. ROUND.

Before *The*  
*Lord Chan-*  
*cellor*, LORD  
ST. LEON-  
ARDS.

By indenture  
of settlement,  
two estates,  
A. and B.,  
were limited  
to the father  
for life and  
subject  
thereto, the  
estate A. was  
limited to the  
first and other  
sons in tail

male and the estate B. was limited to the second and other sons in like manner and it was provided that if the second son should become an eldest son as such should become entitled to the actual possession or to the receipt of the rents and profits of the estate A., the limitations of the estate B. should stand and determine as if such second son were dead without issue. The second son, by the death of his elder brother, became the eldest son and joined his issue in suffering a recovery of the estate A. the uses of which were declared to be in joint appointment of the father and son and subject thereto to the second son in exercise of this power, the father and son by a mortgage in fee of the estate A. raised a sum of money which was paid to the father and son: He died on the death of the father, the estate B. shifted from the second son under the terms of the proviso contained in the settlement.

Held also, that the recovery suffered by the father and son did not bar but prevent the operation of the proviso, and that the mortgage had no effect, but that, notwithstanding both the recovery and the mortgage, the second son came on the death of his father into possession of the estate B. within the meaning of the terms of the settlement.

Held also, that the party entitled to the estate A. might previously to the happening of the event mentioned in the proviso have so exercised his power over the estate as to have prevented it from ever coming into the possession of the second son within the meaning of the terms of the settlement.


The decisions in the cases of *Fazakerley v. Ford*, 4 Sim. 390, and *The Earl of Harewood*, 3 Hare, 372, approved of.

During the life of the father, a portion of the estate A. was sold, and the proceeds applied to the purchase of the land tax of both estates: He died on the estate B. shifting under the provisions of the settlement, the second son had no claim against that estate for the amount expended in the purchase of the land tax of that estate.

the indenture of settlement made on the marriage of the said *J. H. Harrison* and *S. T. Fiske*, to the several hereditaments thereby limited to the second third and other sons of the marriage, in priority to the first son thereof, and to the several stocks funds securities hereditaments and premises acquired in lieu of or by way of substitution for the same by the exercise of the powers of sale and exchange contained in the said settlement. The following statement will show the manner in which the question now brought before the Court arose.

1852.  
  
 HARRISON  
 v.  
 ROUND.

By Indentures of lease and release, dated the 9th and 10th *December* 1783, being the settlement made on the marriage of the said *John Haynes Harrison* and *Sarah Thomas Fiske* (the late father and mother of the Plaintiff), the Rev. *John Harrison*, the father of *John Haynes Harrison* and grandfather of the Plaintiff, in consideration of the marriage and for the other considerations therein mentioned, conveyed and assured the manor or lordship of *Copford* in *Essex* and other lands therein particularly mentioned, of which he (the Rev. *John Harrison*) was then seised in fee, unto Sir *John Cullum* and *James Round* and their heirs, and the said *Sarah Thomas Fiske* conveyed and assured to the same trustees certain estates of which she was seised in fee simple, therein particularly described situate in various parishes therein named in the county of *Suffolk* and also the manors or lordships of *Overhall* and *Netherhall* and the advowson of the rectory of *Thorpe Morrix* and other estates in various other parishes in the county of *Suffolk*, to hold all the said estates conveyed both by the said *John Harrison* and *Sarah Thomas Fiske* as aforesaid, unto the said Sir *John Cullum* and *James Round* and their heirs, upon certain uses and trusts for the benefit of the said *J. H. Harrison* and *S. T. Fiske* for life, and for  
 other

1852.  
  
 HARRISON  
 v.  
 ROUND.

other purposes (all of which had long since determined), and then as to all the estates to the use of *H. Goodeve Harrison* and *Thomas Ruggles* their executors administrators and assigns for the term of five hundred years to be computed from the death of the said *J. H. Harrison* upon the trusts thereafter mentioned : with remainder after the expiration of the said term of five hundred years, as to all the said estates, except the advowson of the rectory of *Thorpe Morrix* and certain manors and estates therein particularly mentioned all which were parcels of the hereditaments thereby conveyed by *Sarah Thomas Fiske* as aforesaid (these estates are for distinction hereafter designated the *Copford Hall* estate), “to the use of the first son of the body of the said *John H. Harrison* on the body of the said *Sarah T. Fiske* to be begotten and the heirs male of the body of such first son lawfully issuing, and in default of such issue, to the use of the second third fourth fifth sixth seventh eighth ninth and all and every other son and sons of the body of the said *J. H. Harrison* on the body of the said *S. T. Fiske* to be begotten severally successively and in remainder one after another as they and every of them should happen to be in seniority of age and priority of birth and of the several and respective heirs male of the bodies of all and every such son and sons lawfully issuing, the elder of such sons and the heirs male of his body always preferred and to take before the younger of such sons and the heirs male of his and their bodies lawfully issuing,” and in default of such issue with divers remainders over in favour of the other issue of the said marriage and of the said *J. H. Harrison* and *S. T. Fiske* as therein mentioned : and as to for and concerning the manor or manors of *Overhall* and *Netherhall* and the advowson of the rectory of *Thorpe Morrix* and the other hereditaments excepted out of the limitations to the first and other sons of the marriage (these estates  
are

are for distinction hereafter designated as the *Overhall estate*), from and immediately after the decease of the survivor of them the said *J. H. Harrison* and *S. T. Fiske* and the determination of the uses estates terms and interests thereinbefore limited thereof and as the same should end and determine and in the mean time subject thereto, in case there should be an eldest or one or more other son or sons of the body of the said *J. H. Harrison* on the body of the said *S. T. Fiske* to be begotten, "to the use of the second son of the body of the said *J. H. Harrison* on the body of the said *S. T. Fiske* to be begotten and the heirs of the body of such second son lawfully issuing, and in default of such issue, to the use of the third fourth fifth sixth seventh eighth ninth and all and every other son and sons of the body of the said *J. H. Harrison* on the body of the said *S. T. Fiske* to be begotten (other than an eldest son) severally successively, and in remainder one after another as they and every of them should happen to be in seniority of age and priority of birth, and of the several and respective heirs of the body and bodies of all and every such son and sons (other than an eldest son) lawfully issuing, the elder of such sons and the heirs of his body to be preferred and to take before the younger of such sons and the heirs of his and their body and bodies issuing," with divers remainders over in favour of the other issue of the said marriage and of the said *S. T. Fiske* as therein mentioned.

And the Indenture contained a proviso in the words following;—"Provided always, and it is hereby declared and agreed by and between all the said parties hereto, that in case it shall happen that the second third or any other younger son or sons of the body of the said *J. H. Harrison* on the body of the said *S. T. Fiske* to be begotten shall become an eldest or only son, and as such

1852.  
HARRISON  
v.  
ROUND.

1852.  
 HARRISON  
 v.  
 ROUND.

shall become entitled to the actual possession or the receipt of the rents and profits of the aforesaid capital messuage called *Copford Hall* and the aforesaid several other hereditaments first hereinbefore limited therewith to the first son of the body of the said *J. H. Harrison* or the body of the said *S. T. Fiske* to be begotten by any one under the limitations and provisions hereinbefore contained, or there shall be any issue from the said second third or such other younger son or sons of the body of the said *J. H. Harrison* on the body of the said *S. T. Fiske* to be begotten who shall become entitled as aforesaid to the said capital messuage called *Copford Hall* and the said several other hereditaments so limited therewith, then and in such case the use and estate and in the said manor or manors lordship or lordships of *Overhall* and *Netherhall* and the said advowson of the rectory of *Thorpe Morrix* and the said entire messuages tenements farms and lands in the possession of &c. with the quit-rents rights members and appurtenances thereunto belonging hereby limited unto or for the benefit of such of them the first second and third or other the younger son and sons of the said *J. H. Harrison* on the body of the said *S. T. Fiske* to be begotten respectively and their respective issue who shall or may so respectively happen to become entitled to the said messuage called *Copford Hall* and the said several other hereditaments so limited therewith, shall from thence forth cease determine and be void to all intents and purposes as if the said second third or such other younger son or sons of the body of the said *S. T. Fiske* to be begotten or such issue of the said second third or other younger son or sons respectively becoming entitled as aforesaid was or were respectively dead without issue of his or their body or respective bodies, and the and in such case and so often as the same shall happen the said manor or manors lordship or lordships of *Overha*  
*ha*



**H**all and *Netherhall* and the said advowson of the rectory of *Thorpe Morrix* and the said entire messuages tenements farms and lands in the possession of &c. with the quit-rents rights members and appurtenances thereto belonging shall go over and remain unto and for the benefit of the person or persons who by virtue of these presents and according to the true intent and meaning hereof shall be next entitled to take and enjoy the said hereditaments last mentioned in case the said second third or such other younger son or sons or their respective issue so as aforesaid becoming entitled to the said messuage called *Copford Hall* and the said hereditaments so limited therewith was or were respectively dead without issue of his or their respective body or bodies, anything hereinbefore contained to the contrary thereof in anywise notwithstanding."

1852.  
HARRISON  
v.  
ROUND.

The term of five hundred years before mentioned was limited, either by mortgage or other disposition of all or any part of the hereditaments comprised therein after the decease of the survivor of them the said *J. H. Harrison* and *S. T. Fiske* or in their joint lifetime or in the lifetime of the survivor if he or she should direct (this power was never exercised), to raise 10,000*l.* if there should be four children of the said marriage other than and except an eldest or only son (which was the event that did happen), as and for the portions of such children, except the eldest. *Mrs. Harrison* and her husband also covenanted to surrender certain copyhold estates (except such part thereof as was held or enjoyed or lay intermixed with the *Overhall* estate), to for and upon the same uses and trusts as were declared concerning the *Copford Hall* estate, and as to such copyhold lands as were held enjoyed or lay intermixed with the *Overhall* estate to for and upon the same uses and trusts as were declared concerning the said *Overhall*

1852.  
 HARRISON  
 v.  
 ROUND.

estate. The trustees were also empowered to lease and sell the settled hereditaments, and to reinvest the proceeds of such sales.

There were ten children of the marriage, four sons and six daughters. The first and eldest son, *John Haynes Harrison*, died in 1811, during his father's lifetime, under twenty-one. The Plaintiff, *Fiske Goodenave Harrison*, was the second son of the marriage, and by the death of his elder brother became the eldest surviving son, and was consequently, under the limitation of the settlement, entitled in remainder expectant upon and subject to the prior life estates and the terms, to the estates limited by the settlement to the first son with remainder to the second and other sons.

In July 1824, the Plaintiff, having then attained twenty-one, joined with his father in suffering a recovery of a considerable portion of the *Copford Hall* estate, it being declared by indenture, dated the 3<sup>rd</sup> July 1824, that such recovery should enure "to such uses upon and for such trusts intents and purposes and with under and subject to such powers provisos agreements and declarations as the said *J. H. Harrison* and the said *F. G. Harrison* shall at any time or times during their joint lives, by any deed or deeds instrument or instruments in writing with or without power of revocation and new appointment to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, from time to time direct limit or appoint, and in default of and until such direction limitation or appointment and so far as every or any such direction or appointment shall not extend, to the uses upon and for the trusts intents and purposes and with under and subject to the powers provisos agreements and declarations to for upon with under and subject to which

which the same premises were and stood limited and settled immediately before the sealing and delivering of these presents." And the same indenture contained a clause for the avoidance of the grant and release thereby made on nonpayment upon the 3rd *January* then next, by the tenant in the recovery to the said *J. H. Harrison* of the sum of 100,000*l.*


1852.  
HARRISON  
v.  
ROUND.

In *June* 1825, the Plaintiff jointly with his father and mother executed a mortgage in fee of the same estate for 5560*l.*, which sum was divided between the Plaintiff and his father. *Thomas Harrison*, the third son of the marriage, during his father's life joined with his father in suffering a recovery of the *Overhall* estate, believing himself entitled to it under the uses of the settlement.

*J. H. Harrison*, the Plaintiff's father, died in 1839, having survived his wife, the Plaintiff's mother, who died in 1825. On this event happening the question arose, whether the shifting clause in the settlement had become operative: the Plaintiff alleged that it had not, and that, by reason of the recovery suffered, he did not take the *Copford Hall* estate within the meaning of the settlement. The present suit was instituted in *May* 1846, to determine this point.

The cause came on to be heard before the late Vice-Chancellor Sir *James Wigram* on the 13th *July* 1848, who directed a Special Case for the opinion of the Judges of the Court of Common Pleas. This Case was argued before the Court of Common Pleas in *February* 1850, and their Lordships, by a certificate dated the 16th *February* 1850, certified in effect against the claim set up by the Plaintiff.

The cause then came on, upon this certificate and upon further

1852.  
  
 HARRISON  
 v.  
 ROUND.

further directions and on the equity reserved, before the late Vice-Chancellor Sir *James Parker*, who made the order of the 9th *March* 1852 above mentioned, in conformity with the certificate. From this order the Plaintiff now appealed to the Lord Chancellor.

Mr. *Bethell* and Mr. *Rogers*, for the Plaintiff, and in support of the appeal.

They contended, on behalf of the second son, that the event contemplated by the settlement had not arisen within the meaning of the proviso. The Court of Common Pleas, in deciding the case, had considered, as the present position of the *Copford Hall* estate had arisen by the act of the Plaintiff himself, that it was not open to him to use the argument that it did not come to him in the way intended by the settlement; but it was submitted that there was no ground for the exception thus sought to be made to the general rule. Provisos of the nature of that now in question must be construed strictly, *Doe v. Yates* (a). They cited and commented on, *The Earl of Scarborough v. Savile* (b), *Fazakerly v. Ford* (c), *Stackpoole v. Stackpoole* (d), *Taylor v. Earl of Harewood* (e), *Burrell v. The Earl of Egremont* (f): they also referred to *Forbes v. Moffatt* (g).

Sir *W. Page Wood* and Mr. *J. V. Prior*, for the Defendant *Thomas Harrison* and his family, supported the order of the Vice-Chancellor.

They admitted that the testator did not intend the  
*Overhall*

(a) 5 *B. & A.* 544.

(b) 3 *A. & E.* 897.

(c) 4 *Sim.* 390; 1 *A. & E.*  
 897.

(d) 4 *Dru. & War.* 320.

(e) 3 *Hare*, 372.

(f) 7 *Beav.* 205.

(g) 18 *Ves.* 384.

*Overhall* estate to shift, unless the second son had the full benefit of the limitations of the *Copford Hall* estate under the settlement; but they contended, that as the plan of the settlement enabled the son, with the father's concurrence, to charge his estate, and as he had done so and got the benefit of the charge, it could not be said that this act was to prevent the operation of the proviso for shifting. They submitted that if it could be shown that it was intended that the estate should come to the son free and uncharged, still he could not now set up the charge which he himself had created, and which it was in his power to get rid of: that the present case was quite different from any in which the Court had decided that clauses similar to the proviso in question did not operate under the circumstances. They referred to Mr. *Butler's* note on *Co. Litt.* 327. a.

1852.  
 HARRISON  
 v.  
 ROUND.

Mr. *Bethell*, in reply.

The LORD CHANCELLOR.

This is a very difficult case, and differs from any that has hitherto come before the Court. By the Deed in question the *Copford Hall* estate was settled, after the life estate of the father, upon the first and other sons in tail male in the ordinary way; and the *Overhall* estate was settled in a similar manner on the second and other sons; and it being intended that the two estates should not be united, it was for that purpose provided that in case, &c. (His Lordship here read the proviso for shifting above set out).

The facts appear to have been, that the second son became by the death of the elder brother the first son, and as such entitled, as tenant in tail male in remainder expectant upon his father's death, not only to

1852.  
 HARRISON  
 v.  
 ROUND.

to the *Copford Hall* estate originally limited to the first son, but also to the *Overhall* estate originally limited to him as the second son; and that after the death of the first son the father and this second son joined in a recovery, upon which in a great measure the decision of the question raised before me turns.

By the recovery deed, the father and son conveyed, in the way which was at that time usual when deeds of this kind were well prepared, they conveyed to the tenant the præcipe during the joint lives of the father and the person to whom the conveyance was made, so as to leave in the father a reversion of his life estate; and there was also what was called the 100,000*l.* clause for the purpose of avoiding the conveyance. All this shows that, as far as regarded the father's estate, the parties intended to leave it, as far as they could, unaffected by the operation of the recovery and the uses declared by the deed: these uses were to the joint appointment of the father and son, and in default of and until such appointment to the same uses to which the premises were previously limited. (His Lordship read the clause, as above set out). The effect of this was, that, subject to the exercise of the power of appointment by the father and son, the estate remained precisely in the same position as if the recovery had not been suffered; and if no mortgage had been created, it is impossible to say that the strict terms of the proviso in question would not have been answered, when the second son after the death of his father came into possession of the *Copford Hall* estate. The recovery did not so alter the estate as to prevent the operation of the proviso, for no rule of law would in such a case prevent the original intention of the parties from having its full effect and operation.


It is, however, clear that by force of the power of appointment

appointment which enabled the father and son to dispose of the fee, they might have disposed of it in a way that would altogether have defeated the uses of the settlement; and the question is, what is the effect of that which they actually did. What they really did was this: they conveyed jointly to a mortgagee in fee to raise a sum of money, which upon the face of the instrument is represented to have been paid to the father, who was tenant for life, and to the son, who was tenant in tail, with a proviso for redemption and reconveyance upon redemption to the uses to which the estate then stood settled. Thus, then, there were no new estates raised by the operation of the recovery: there was, indeed, a charge created, but so far as the inheritance was concerned the uses limited by the original settlement remained just as operative, subject to the charge, after the execution of the mortgage as they could possibly have been previously. The question, therefore, simply is, whether the charge would prevent the operation of the proviso.

1852.  
  
 HARRISON  
 v.  
 ROUND.

As regards a question that has been alluded to, namely, whether the proviso did not create a perpetuity, I am clearly of opinion that no valid objection can be raised on that ground.

Then it is said that the terms of the proviso are such as require a very strict construction; and I agree that provisos of this sort, which are to defeat an estate, are not to have an unnatural or an unnecessarily enlarged construction put upon them. As, however, the party who creates the estate has also a right to limit it over or to defeat it, a fair construction ought to be given to the words which he uses for that purpose. In the present case, it is provided that the estate limited to the second son shall cease, if it should happen that that second son

1852.  
  
HARRISON  
v.  
ROUND.

son should become an eldest son and as such become entitled to the actual possession or to the receipt of the rents and profits of the estate limited to the first son. These events have happened : the second son has become an eldest son, and as such he has, subject to the mortgage, become entitled to the possession of the estate and to the receipt of the rents and profits ; for, in the view of this Court, his estate in the equity of redemption is precisely the same estate as was created under the settlement itself. Equity follows the law, and considers a mortgage only as a charge, and not as a disposition of the inheritance of the estate beyond the charge, unless by the deed itself estates are created beyond the charge ; and therefore, in this instance the second son took the estate, subject to the charge no doubt, but he took it in point of truth and actual fact under the limitations of the settlement. The settlement gave it to him originally, the recovery deed restored it to him, the mortgage deed kept it still in him, and no act was done to take it from him ; and thus, so far as the decision of this case is concerned, I must regard him as now being tenant in tail of the estate under the settlement.

Very ingenious arguments have been addressed to the Court in the course of the hearing, but some of them certainly went too far. It was said that if these estates had been sold, the purchase-money would have to be treated precisely in the same way as if the estate had come to the father. I am not called upon to give an opinion upon that ; but I should have very great doubt indeed whether it was possible to maintain such an argument, because I entirely agree with what has been said in this case, that I have no authority to prevent the persons entitled to the *Copford Hall* estate, before the event happens, from exercising their rights, and disposing of that estate exactly as they think proper, and that




that if they do an act, and they have a right to do it, which according to law would prevent the operation of the clause, by preventing the estate ever coming into the actual possession of the second son under the limitations of the settlement, it would not be in the power of this Court to cut down the effect of that act. So again, with regard to an argument which has been suggested relative to the mortgages, that also is carried too far; for it is impossible to say that all mortgages are to be put out of the question. That would be entirely to set aside and overrule the decision in *Fazakerly v. Ford* (a); for I take the law to be settled that, generally speaking, where, as in that case, the limitations of the estate are extrinsic to the settlement containing the shifting clause, if a charge is created (for a charge is just as much taken from the estate as if a portion of the estate were taken from it), the clause will not operate. These considerations have, however, nothing to do with the present case, which is a mere question whether the estate does come to the party under the settlement, in the way in which the proviso itself intended.

1852.  
  
 HARRISON  
 v.  
 ROUND.

That brings me to the point which I have to decide, and a very nice and important point it is. It has been very well argued, and I have had all the assistance which it was possible for the Court to have on such a question. I quite admit that the father and son might have dealt precisely as they pleased with the *Copford Hall* estate: they might have settled it, or have sold it and dealt with the proceeds in any way they thought proper; and if they had given the estate away to a third person, and that third person had afterwards given it to the second son, in such a case the second son would not have come into

(a) 4 Sim. 390.

1852.  
  
 HARRISON  
 v.  
 ROUF D.

into possession of it within the terms of the clause. I am not going to say a word to break in upon the unlimited power of the persons entitled to the *Copford Hall* estate, although one of those persons might be the person entitled to the *Overhall* estate, to dispose of the *Copford Hall* estate. The fact here, however, is, that the second son, being entitled in remainder to the *Overhall* estate which was to go over if the *Copford Hall* estate came to him, and being at the same time entitled in remainder to the *Copford Hall* estate on the death of his elder brother without issue, joined with the father in executing the mortgage which I have before mentioned.

And first, it cannot be said, because the son has anticipated a portion of the estate which has descended to him, that the estate itself has not come to him under the limitations of the deed, and within the meaning of the proviso in question. Supposing that, without the assistance of his father, he had, as tenant in tail in remainder, during the lifetime of his father executed the mortgage, no one could have said that that would have prevented the operation of this proviso. Such an act would have been consistent with the proviso and with the whole of the settlement: he would merely have exercised his rights for his own benefit over his own estate, and the proviso would have operated on his father's death, if by that event he became entitled to the estate.

If, then, that would be the effect of the act of the son alone, would the effect be different if the father and son doing it jointly. When the father and son, one being the tenant for life and the other the tenant in tail in remainder, enter into a mortgage and receive the money jointly, and there is no evidence as to the manner in which the money was appropriated,  
 mu

1852.

HARRISON

v.

ROUND.

must clearly be considered in law that it was received by them in respect of their different interests. I should, therefore, conceive that the father taking upon himself, as he was bound to do, the payment of the interest of the whole of the charge during the lifetime of the eldest son, would take such a portion of the money raised as would represent his life interest with that burthen, and the son would take that which would represent his interest to take effect after the father's death. In that way the son gets, in point of fact, the whole benefit of the charge, and when the estate falls into possession, and the charge actually comes upon him, it cannot be asserted in a court of justice that he has the estate burthened beyond the benefit which he has received. The charge was created by himself, and he has had the full benefit of it. Thus, therefore, if by settlement estate A. is given subject to a life estate in the father to the first son, and estate B. is in like manner given to the second son, with a proviso that if estate A. shall come to the second son then estate B. shall go over to the third son; and if the second son, having become entitled to the first estate, living the father chooses to anticipate part of it, can it be said that, according to the intention, the son has not come into the actual possession of the property in the way the settlor intended. Such an anticipation cannot prevent the operation of the proviso: the son may, by the concurrence or indulgence of his father, have got a benefit not within the exact terms of the settlement, but no charge has been thrown upon the property against the son. The argument is, that the act done is against the settlement; but, on the contrary, I consider that the act is done under the settlement, in pursuance of the settlement, and consistently with the settlement: it gives to the son by anticipation a benefit which, without the concurrence of the father, he never could have obtained, but it throws no charge upon the estate which  
the

1852.  
HARRISON  
v.  
ROUND.

the son himself did not create. If he had created the charge the moment after he came into possession on his father's death, it would not have affected the proviso, because the estate would then have gone over; and the circumstance of his creating it in his father's lifetime can be no hindrance to the operation of the proviso.

It appears, therefore, to me, on a very full consideration of the case, and without meaning to break in upon any rule of law as regards the rights of the parties over the first estate, that no act has been done to take the estate out of the settlement. I am of opinion that the son has anticipated part of that which he ought regularly to have waited for until the father's death, but that he takes only subject to his own charge, and that he has, therefore, every benefit which ever was intended for him by the author of the proviso.

But there is another circumstance in this case, to which we may have regard in reference to the mortgage in question. Was it the intention of the father and son to take the estate out of settlement and to defeat the limitation over. If they had intended to defeat the limitation, they could have done so by suffering a recovery of the *Overhall* estate: they, however, do not act thus. In the first place, an anxious intention is displayed, as I have already noticed, to prevent the deed of recovery from operating beyond the father's life estate; and then the father believing, erroneously no doubt, that the estate had already shifted, joined with a third son in suffering a recovery of the *Overhall* estate, and resettling that estate to other uses. The father, therefore, clearly never would have joined in any act as regards the *Copford Hall* estate which he believed would have prevented the operation of this proviso, for the father's every act shows that he intended to leave that  
proviso

proviso operative, and he believed to the moment of his death that it was operative. If, therefore, the rule of law had compelled me to decide with the Appellant, I must necessarily have subverted every intention which the father himself ever had with regard to this property, and every notion he ever entertained with regard to the effect of the act he had done.

1852.  
HARRISON  
v.  
ROUND.

With respect to the cases to which reference has been made, I think there is no difficulty. I intend to say nothing, and I do not entertain any opinion, adverse to *Fazakerly v. Ford* (a), which I think was rightly decided. The case also before Vice-Chancellor *Wigram* appears to me to be right, and that where an estate has actually gone out of the settlement, although it comes back to the party to whom it was given, it does not come in the manner in which it was intended. When the estate is once fairly taken out of the settlement, whether it comes back or not is not the question, but the question is, whether in coming back it goes in the mode in which it was to go according to the terms of the settlement.

I must, therefore, disallow the present appeal; but, notwithstanding the decision of the Court below and the Court of Common Pleas, I think the point is one of so much nicety and difficulty that I shall not give costs.

---

His Lordship's attention was then called to the following point which had not been dealt with by the Vice-Chancellor.

It appeared that, during the life of the father and of the first son, a part of the *Copford Hall* estate had been sold,

(a) 4 Sim. 390.

1852.  
HARRISON  
v.  
ROUND.

sold, and the proceeds of the sale applied in purchasing the land-tax of both that and the *Overhall* estate. The *Overhall* estate having, under the decision just pronounced, passed from the Plaintiff the second son, the Plaintiff claimed to be entitled to have a charge on the *Overhall* estate for the proportion of the money raised which had been applied in the purchase of the land-tax of that estate.

The Counsel for the different parties having addressed the Court,

*The* LORD CHANCELLOR, after observing that the facts did not seem to be very distinctly ascertained, said;—It appears, as I understand it, that at one time, the same person being tenant in tail of both estates, the land-tax upon both estates was redeemed with money produced by the sale of one of them; and the question is, whether there should be any apportionment of that money after that time. If the effect was redemption, which I apprehend it was, I should think it quite clear that there could be no apportionment, and I do not see how the Plaintiff could have any equity. The same person being tenant in tail of the two estates, and therefore entitled to hold them as they were, uncharged with the money, I do not think that on one estate afterwards going over in a different way, there could be any equity to follow the money, so as to bring it back into the settlement.

---

1852.

DYKE v. RENDALL.

**T**HE bill in the present suit was filed on the 6th July 1848, by *Elizabeth Dyke*, the widow of *Thomas Webb Dyke*, against *Charles Edward Rendall*, for the recovery of dower out of certain freehold estates acquired by her husband during his coverture, and sold by him previously to his death to one *Richard Cox*, from whose devisees the Defendant, *Charles Edward Rendall*, purchased the same, with full notice of the Plaintiff's right. The bill stated that the Defendant alleged that the Plaintiff's right had been barred by a settlement executed on her marriage, and charged that so far as the settlement proceeded from the husband it had failed to be productive, inasmuch as the sums of 2000*l.* and 500*l.*, secured in that settlement by the bond of her husband for the benefit of the Plaintiff during her life, had not been paid.

It appeared by the answer, and was proved by the evidence, that the Plaintiff was twenty-eight years of age when she married *Thomas W. Dyke*, in the year 1810, and that upon the occasion of that marriage a settlement was executed, to which she was party by her then name of *Elizabeth Skinner*. The Defendant submitted that the Plaintiff's right or title to dower was in equity well and effectually barred by the settlement.

By the decree made on the hearing of the cause by the Vice-Chancellor *Wigram*, on the 20th April 1849, it was

bought certain lands, which he subsequently sold to a purchaser, from whose devisees the Defendant purchased with notice of the settlement. The husband died without satisfying the bond. On a bill by the wife for dower out of the lands so sold: Held, that her right was barred by the settlement, and that she had no lien on, or right to resort to, the lands for the satisfaction of the amount due on the bond.

July 24. 27.

Before *The Lord Chancellor*,  
LORD ST.  
LEONARDS.

By a settlement made on the marriage of an adult female, it was declared that in consideration of the intended marriage, and "for providing a competent jointure and provision of maintenance for" the wife and issue of the marriage, the father of the husband had paid him £3000; and that the husband had given a bond for the payment of £2000 six months after the marriage, to be settled on trusts for the benefit of himself, his wife, and the issue of the marriage. During the coverture, the husband

1852.  
 DYKE  
 v.  
 RENDALL.

was referred to the Master to inquire whether an settlement had been made on the marriage of the Plaintiff and her late husband, *T. W. Dyke*, and whether such settlement (if any) was actually productive of an benefits, and what was the amount of such benefits actually realized and received by the Plaintiff.

The Master found, among other things, that a settlement had been made on or prior to the marriage of the Plaintiff. The settlement, which was fully set out in the report, was made between *William Dyke* of the first part, *John Skinner* of the second part, *T. W. Dyke* of the third part, *Elizabeth Skinner* of the fourth part, and the trustees therein named of the fifth part, and contained the following recitals: that in consideration of the intended marriage, and for providing a competent jointure and provision of maintenance for *Elizabeth Skinner*, in case she should, after the intended marriage survive and outlive *T. W. Dyke*, and for securing a provision for their issue, *William Dyke* had paid to *T. W. Dyke*, at or before the enrolling and delivery thereof, the sum of 3000*l.*, the receipt of which *T. W. Dyke* did thereby acknowledge, and that *John Skinner* had paid to *T. W. Dyke* the sum of 851*l.* 10*s.*, the receipt of which *T. W. Dyke* did also thereby acknowledge, and *J. Skinner* had agreed to enter into the covenant thereafter contained for securing the payment of the further sum of 500*l.* of like lawful money to *T. W. Dyke*, upon the death of him *J. Skinner*, which said sums of 851*l.* 10*s.* and 500*l.* were intended as the marriage portion of *Elizabeth Skinner*; and that it had been agreed by and between the parties thereto, that *T. W. Dyke* should give his bond to the trustees conditioned for the payment of the sum of 2000*l.*, with interest, at or after the rate of 5*l.* for 100*l.* for a year, within six months from the solemnization of the intended marriage, upon the several trusts therein

aft



after mentioned and declared, and that *T. W. Dyke*, by his bond or obligation, bearing even date therewith, was become bound unto the trustees accordingly: and it was thereby witnessed and agreed that the interest of the 2000*l.* was to be for *T. W. Dyke* for his life, and after his decease for the Plaintiff for her life, with limitations over after the death of the survivor, on certain trusts in favour of their issue, and on failure of issue: and it was also witnessed that in consideration of the intended marriage, *John Skinner* covenanted to pay 500*l.* to *T. W. Dyke* within six months after the decease of the said *J. Skinner*, on condition that *T. W. Dyke* should give a bond to secure the like sum.

1852.  
  
 DYKE  
 v.  
 RENDALL.

The Master also found that *J. Skinner* had died, and that the sum of 984*l.* 18*s.*, which included arrears of interest, had been received by the trustees of the settlement in respect of the 500*l.* so agreed to be paid by *J. Skinner*, and that it had been subsequently arranged between *T. W. Dyke* and the Plaintiff and their children, that the sum of 484*l.* 18*s.* should be secured on the trusts of the settlement in part liquidation of the sum of 2000*l.* so agreed to be paid by *T. W. Dyke*, but which he was unable to pay; and the Master found that the benefits settled or assured to or in trust for the Plaintiff, of which the settlement was actually productive, consisted of the sums of 500*l.* and 484*l.* 18*s.*, and that the interest in respect of which had been received by the Plaintiff, and that there was 805*l.* 6*s.* arrears of interest due on the 1515*l.* 2*s.* residue of the 2000*l.*, the unpaid residue of the bond debt for 2000*l.*

On the hearing of the cause, on further directions by the Vice-Chancellor *Knight Bruce*, on the 21st July 1851, his Honor considered that he was bound by the  
 authority

1852.  
 DYKE  
 v.  
 RENDALL.

authority of *Walker v. Walker* (a), to hold that the Plaintiff's claim to dower was barred by the recital in the settlement, but he decided that the Plaintiff had a lien on the estates which had been acquired and sold by her husband during the coverture for so much of the 2000*l.* as had not been received by her, and expressed his opinion, that if the lien was not exactly the same as that of a vendor of an estate for his unpaid purchase money yet that it was analogous to it. It was accordingly by the decree declared that the plaintiff was entitled in respect of her dower to one-third of the receipts and profits of the estate in question, not exceeding for such one-third the sum of 60*l.* 12*s.* per annum, being the interest at 4*l.* per cent., which would have accrued due on 1515*l.* 2*s.* remaining unpaid under the bond, and that she was entitled to such interest from the time when the purchaser entered into possession of the estate. From this decree the Defendant now appealed to the Lord Chancellor.

Mr. *Greene* and Mr. *Vance*, for the Plaintiff, in support of the decree.

The facts disclose a clear title to dower in the Plaintiff, unless she is precluded from asserting such title by some equitable bar. The first question is, whether there has been such an acceptance of the bond as to bar the Plaintiff's right at all; and secondly, if taken to bar the right at all, whether she is to be barred to the full extent secured by the bond, or to the extent only to which the Master finds that payment has been paid in satisfaction of the bond. There is no expression in the settlement that the 2000*l.* was to be accepted in lieu of any rights which the Plaintiff might have *aliunde*; the mere recital that it was to be for "providing a competent jointure" does not lead to such a conclusion.

(a) 1 *Ves.* 54.

a conclusion. In the case of *Walker v. Walker* (a), by which the Vice-Chancellor felt himself concluded on the question of equitable bar, and which is somewhat similar in its circumstances, Lord *Hardwicke* held that the wife was barred, but it must be observed that the expression in the settlement in that case was that the provision was to be for the intended wife's "jointure, and in full bar and recompence of all dower or thirds which she can be entitled to or any way claim out of any lands, tenements, messuages, or hereditaments which he now is or ever after during the coverture shall be seised of freehold or inheritance." In the present instance the recital in the settlement does not refer to lands which might be subsequently acquired by the husband, but even if it did the Plaintiff has at most only provisionally given up her right to dower. At law such a provision would be no bar, and *à fortiori*, it ought not to be so considered in equity.

1852.  
  
 DYKE  
 v.  
 RENDALL.

[The *Lord Chancellor* referred to *Drury v. Drury* (b) as deciding that an infant might be bound by a settlement in bar of dower, and observed that, assuming an infant were subject to be evicted by the terms of a settlement, it would be impossible to hold that an adult female would not be bound. He also mentioned the case of *Caruthers v. Caruthers* (c).]

The principles of equity upon which the Plaintiff relies are to be found in the deliberate judgment of Sir *A. Hart*, in the case of *Power v. Sheil* (d), where he observes: "The law says the intended wife shall not by contract bar her dower, except certain requisites are complied with. Equity may dispense with the form of those

(a) 1 *Ves.* 54.

(b) 2 *Eden*, 59.

(c) 4 *Bro. C. C.* 500.

(d) 1 *Moll.* 296. See p. 312 *A.*

1852.  
 {  
 DYKE  
 v.  
 RENDALL.

those requisites, but not with the substantial matter which they all tend to, that is, a solid provision for the widow, such as was agreed upon by the contracting parties. A Court of Equity deals with an equitable interest precisely as a Court of Law would with a legal one. It preserves the analogy, and by no means looks at this directly as an agreement independent of that analogy."


It was argued in the Court below that the Plaintiff had elected to take under the settlement; but the doctrine of election is clearly inapplicable, inasmuch as at the time of the settlement there was nothing to elect between. The Plaintiff clearly contracted for the payment of 2000*l.*, as is shown by the trusts of the settlement. But assuming that the Vice-Chancellor was right in deciding that the provision in this settlement was an equitable bar, it is confidently submitted that he was also right in holding that the Plaintiff has a lien analogous to that of an unpaid vendor on the estate for so much of the 2000*l.* as has not been received by her, *Mackreth v. Symmons (a)*.

Mr. *Malins* and Mr. *Bird*, in support of the Appeal.

If the Plaintiff's construction be correct, it follows that whatever may be the provision for a wife on the occasion of her marriage, it will be necessary that every purchaser of lands must look into the circumstances of the vendor, if married; and that no provision short of actual satisfaction will suffice to protect the purchaser from the claims of the wife to dower; it is, however, well settled that an adult female may contract herself out of all rights to dower; *Vizard v. Longdale*, cited in *Tinney*

(a) 15 *Ves.* 329.

*Tinney v. Tinney* (a), *Caruthers v. Caruthers* (b), *Simpson v. Gutteridge* (c), and it is unnecessary that there should be any other consideration than that of marriage. Even in *Power v. Sheil* (d), Sir A. Hart did not decide that there could be no bar to dower; but only on the particular circumstances of the case that there was no equitable bar.

1852.  
  
 DYKE  
 v.  
 RENDALL.

[The *Lord Chancellor*.—Sir A. Hart in that case undoubtedly appears to have considered that a woman could not give up her dower without consideration.]

In the present case there is an equitable bar, not only by reason of contract, but also because there has been an absolute election, as evidenced by the acceptance of part of the sum covenanted to be paid; the Plaintiff's remedy therefore is under the bond, and, under such circumstances, there is no analogy to dower at law; for a collateral satisfaction may be a good bar to dower in equity, though not pleadable at law, *Lawrence v. Lawrence* (e); but even if in the present case dower could be said to attach at common law, still certainly not to the extent claimed, and at most only to the amount of the deficiency under the bond. It is clear also, that inasmuch as the provision in the settlement constituting the bar is not a jointure under the Statute of Uses (27 Hen. 8, c. 10), the 7th section of that statute, by which a remedy in case of eviction is given, cannot be brought in aid of the Plaintiff's claim. As to the argument that this claim is supported and falls within the principle of a vendor's lien for unpaid purchase money, that doctrine can have no bearing in a case like this, where  
 the

(a) 3 *Atk.* 8; *S. C.*, *Kelynge Rep.* 17.

(b) 4 *Bro. C. C.* 500.

(c) 1 *Madd.* 609.

(d) 1 *Moll.* 296.

(e) 2 *Vern.* 365.

1852.  
 {  
 DYKE  
 v.  
 RENDALL.

the land on which dower is claimed did not belong to the husband at the date of the contract of marriage.

Mr. *Greene*, in reply.

The question here is not whether an adult may or not contract herself out of her dower, but whether this Plaintiff has in fact so contracted. In *Simpson v. Gutteridge* (a) there was no suggestion that the wife had been evicted from her dower; and there was, moreover, in that case an Act of Parliament giving the purchaser a statutory title.

*The LORD CHANCELLOR.*

In the case of *Vizard v. Longdale*, cited in *Tinney v. Tinney* (b), there was no statement that the provision was intended for the jointure of the wife, whereas in the present case there is an express recital that the sums paid and to be secured were for a "competent jointure and provision of maintenance." I think it very clear, therefore, that the words used in the settlement before me are in themselves sufficient to operate in this Court in bar of dower; but whether in the events which have happened they ought to be so construed is a different question. This is a peculiar contract, and, before giving my judgment upon it, I shall again look at Sir *A. Hart's* decision in *Power v. Sheil* (c). I confess, however, that I do not understand the observations attributed to him, to the effect that an adult female cannot in equity contract herself absolutely out of dower. In my opinion there can be no doubt whatever of her right so to contract previously to her marriage,

(a) 1 *Madd.* 609.

(b) 3 *Atk.* 8; *S.C.*, *Kelynge Rep.* 17.

(c) 1 *Moll.* 296.

riage, and to bar herself of all dower or thirds that may accrue to her from her husband's estate; if that is so, the question is, what has the Plaintiff here contracted for. The settlement is certainly of a singular shape; the fathers of the husband and of the wife are parties, and the husband provides no money. (His Lordship here read the recitals, and proceeded): I apprehend that the true consideration for the bar of the Plaintiff's dower was the actual payment of 3000*l.* by the father of the husband, whereby he may be considered as saying,—I intend that my son's estate shall not be encumbered with dower; I will make such a provision for him as will enable him to make a competent provision for his wife.—I am very much inclined to think that the moment the money was paid by the husband's father the condition for the release of dower was complied with, and that this lady could not afterwards claim her dower: but if that were not so, the next question which arises is as to whether it was intended that the bond should be accepted as a satisfaction of dower. If no reliance was intended to be placed on the bond, why was it taken, or why was not the husband prevented from appropriating the money paid by his father. It is also to be observed that at the time of the marriage the husband had no estate on which dower could have attached, and at that time the wife had not even an inchoate title. On these grounds, therefore, it appears to me that she has chosen her remedy and accepted a security, and I see nothing in any of the authorities to alter the view of the case I now entertain, and as at present advised I do not think that the Plaintiff has any right, on the failure of the bond, to go against the estate subsequently purchased, but I will not part with this case without further consideration.

1852.

*DYKE*  
*v.*  
*RENDALL.*

1852.

*The* LORD CHANCELLOR.

*DYKE*  
*v.*  
*RENDALL.*

July 27.


In this case I concur with the Vice-Chancellor in thinking that the settlement must be taken in bar of dower. There is, however, another question of a very different nature, namely, whether the Plaintiff is entitled to any lien on the lands which were bought and sold by her husband during the coverture.

To determine this we must consider the difference in point of law between a legal and an equitable bar of dower. *Vernon's case* (a) explains how the Statute of Uses applied to dower. A great portion of the lands of this country being vested in feoffees to uses, were exempt from dower, but the statute having converted uses into a legal estate, the consequence was that the lands became subject to dower. The statute however provided against the wife being entitled both by settlement and under uses, and having gone so far proceeded to enact, that if the widow should be evicted from her legal jointure she should be remitted to her dower; thus where the clause of eviction applies, it operates on the legal jointure which made the bar under the statute. The statute creates the bar, and creates also an exception, and the clause of eviction never can operate except when the bar is created by the statute. Let us now see how this applies to equity. It was soon settled that what was not a legal bar might be made an equitable bar, the ground of this equitable bar being contract; this did not proceed on any analogy to the legal bar. As to the authorities, there are very few. The rule of the Court is I think correctly stated by Lord *Alvanley*, in *Caruthers v. Caruthers* (b), that an adult female may take anything in bar of dower, that she may take a provision out of the personal estate, or "even a chance in satisfaction

(a) 4 *Rep.* 1 *A.*(b) 4 *Bro. C. C.* 500.



satisfaction for her dower, acting with her eyes open." This Court disregards the nature of the property and the quantum, and therefore an equitable bar has none of those qualities which attach to a legal bar; it is on contract only, as laid down by Lord *Redesdale*, in the case of *Birmingham v. Kirwan* (a), where his Lordship observes: "The principle then that the wife cannot have both dower, and what is given in lieu of dower being acknowledged at law as well as in equity, the only question in such cases must be, whether the provision alleged to have been given in satisfaction of dower was so given or not; if the provision results from contract, the question will be simply, whether that was part of the contract."

1852.  
  
 DYKE  
 v.  
 RENDALL.

In *Simpson v. Gutteridge* (b), Sir *Thomas Plumer* thought that the doctrine there broached, that a married man could not make a valid conveyance without a fine unless there was an outstanding term, could not be sustained, and that the practice of conveyancers was uniformly against requiring an inspection of the title-deeds of an estate settled in lieu of dower. If the present were a jointure operating as a bar under the Statute of *Uses*, the case would have been governed by the 7th section of that statute, but in equity the bar rests solely on contract, and my opinion is that in this Court, if a woman, being of age, accepts a particular something in satisfaction of dower, she must take it with all its faults, and must look at the contract alone, and cannot in case of eviction come against any one in possession of the lands, on which otherwise her dower might have attached; this has nothing to do with the performance of covenants and the like.

The

(a) 2 *Sch. & Lef.* 444; see p. 452. (b) 1 *Madd.* 609.

1852.  
 {  
 DYKE  
 v.  
 RENDALL.

The question then is, did this lady or not accept the settlement in bar of dower. His Lordship here recapitulated the facts of the case, and added:—My conclusion is, that the Plaintiff has accepted in lieu of dower payment of money at least, and that she is also concluded by the acceptance of the bond, and, although the bond was not satisfied, that she has no right to resort to the lands of her husband bought after, and sold during, the marriage. The Defendant, the purchaser, having naturally asked for the production of the settlement, on its being produced had, I think, good reason to be satisfied that the Plaintiff was not entitled to dower upon the land.

The decree of the Vice-Chancellor must therefore be varied, and the bill must be dismissed, but without costs, as the Plaintiff has relied on the authority of *Power v. Sheil* (a).

---

YEATMAN v. MOUSLEY.

Nov. 20.

Before *The*  
 LORDS JUSTICES.

A printed bill ordered to be received and filed, although a mistaken transposition of the names of one of the parties had been corrected in ink.

MR. SCHOMBERG moved that a printed bill might be received and filed with a slight correction made in ink, the christian names of the Plaintiff having been printed "*Maria Constantia*," instead of "*Constantia Maria*" in the title of the bill.

The application had been made to Vice-Chancellor *Kindersley*, who recommended that it should be brought before the Lords Justices.

Their Lordships were of opinion that they would not be departing from the spirit of the Act of Parliament by allowing the bill to be filed as altered, but did not wish to be

a) 1 *Moll.* 296.

be understood as intending to sanction the filing of a bill not wholly printed, where the alteration was at all extensive or important, or where it was such as to interfere with the legibility of the bill.

1852.

YEATMAN  
v.  
MOUSLEY.

ATKINSON v. PARKER.

Nov. 20.

**T**HIS was the suit of an infant legatee for the administration of the real and personal estate of a testator. During the progress of the suit the Plaintiff married. A settlement was approved of by the Master, and executed in pursuance of an order of the Court. By it property to which the Plaintiff was entitled under the will was conveyed and assigned to trustees upon trusts for the benefit of herself and her children.

A motion had been made, as of course, under the statute 15 & 16 Vict. c. 86, s. 52 (a), for an order to the effect

Before *The*  
LORDS JUSTICES.

The 52nd section of the Chancery Practice Amendment Act, 15 & 16 Vict. c. 86, providing that upon a suit becoming defective by reason of transmission of interest, an order to the effect of the usual supplemental decree may be obtained, as of course upon an allegation of the transmission of interest, applies to cases where the rights of the Plaintiff are affected by a settlement, executed after the institution of the suit.

(a) Upon any suit in the said Court becoming abated by death, marriage, or otherwise, or defective, by reason of some change or transmission of interest or liability, it shall not be necessary to exhibit any bill of revivor or supplemental bill in order to obtain the usual order to revive such suit, or the usual or necessary decree or order to carry on the proceedings; but an order to the effect of the usual order to revive or of the usual supplemental decree may be obtained as of course upon an allegation of the abatement of such suit, or of the same having become defective, and of the change or transmission of inter-

est or liability; and an order so obtained, when served upon the party or parties who according to the present practice of the said Court would be Defendant or Defendants to the bill of revivor or supplemental bill, shall from the time of such service be binding on such party or parties in the same manner in every respect as if such order had been regularly obtained according to the existing practice of the said Court; and such party or parties shall thenceforth become a party or parties to the suit, and shall be bound to enter an appearance thereto in the office of the clerks of records and writs, within such time and in like

1852  
 ATKINSON  
 v.  
 PARKER.

effect of the usual supplementary order, on an allegation of the above facts, to bring the trustees of the marriage settlement before the Court; but the Vice-Chancellor *Stuart* doubted whether the section applied to a case where the rights of the Plaintiff were affected by a settlement, or whether the settlement did not still require to be regularly pleaded and proved. His Honor suggested that the opinion of the Lords Justices should be asked on the point.

Mr. *Hardy* now applied accordingly.

Their Lordships were of opinion that the case was within the Act.

like manner as if he or they had been duly served with process to appear to a bill of revivor or supplemental bill filed against him; provided that it shall be open to the party or parties so served, within such time after service as shall be in that behalf prescribed by any general order of the Lord Chancellor, to apply to the Court by motion or petition to discharge such order on any ground which would have been open to him on a bill of revivor or supplemental bill, stating the previous proceedings in the suit

and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon: Provided also, that if any party so served shall be under any disability other than coverture, such order shall be of no force or effect as against such party until a guardian or guardians *ad litem* shall have been duly appointed for such party, and such time shall have elapsed thereafter as shall be prescribed by any general order of the Lord Chancellor in that behalf.

1851.

*Ex parte* MARTHA CHEETHAM.

Nov. 12.

In the Matter of CHEETHAM.

**T**HIS was a petition for payment out of Court of a sum, standing in the name of the Accountant in Bankruptcy, to a separate account, the Petitioner having, on attaining majority, become absolutely entitled to the fund.

Before *The*  
LORDS JUSTICES.

In a case in which, under the Bankrupt Law Consolidation Act, the Commissioner had jurisdiction to make an order, the Court declined interfering in the first instance.

Mr. *Elmsley* supported the petition.

*The* LORD JUSTICE KNIGHT BRUCE.

Have we jurisdiction to make the order in the first instance? Our impression is, that however this may be, we ought not to interfere, the Commissioner having now power to make the order.

Mr. *Elmsley* said, that the Commissioner doubted whether he had jurisdiction, an order for the transfer out of Court of other parts of the fund having been made by the late Court of Review.

*The* LORD JUSTICE KNIGHT BRUCE.

Mr. *Vizard* will write to the Commissioner upon the subject, and if he still shall feel any difficulty we will make the order, and, if necessary, on an application in the nature of an appeal (a).

(a) The same course was taken after the passing of the 1 & 2 Will. IV. c. 56, creating  
VOL. II.

ing the Court of Review, the Lord Chancellor having, after that Act passed, in general de-  
Q D. M. G.

1851.

*Ex parte*  
CHEETHAM.

clined to exercise original jurisdiction, although it was not taken from him by the Act: see *Ex parte Lowe*, 1 D. & C. 79; *Ex parte Benson*, 1 D. & C. 324; *Ex parte Brittain*, 3 M. & A. 325; *Ex parte Keys*, 1 M. & A. 226: *Ex parte Van Sandau, De Gex*, 55 and 303. It may be remarked that Schedule A. to the Bankrupt Law Consolidation Act, 1849, limits the repealing words to the terms of the 3rd section of the 10 & 11 Vict. c. 102. The 2nd section of the last-mentioned Act, therefore, seems to be unrepealed; and as this was the section by which the jurisdiction of the Court of Review was given to the Vice-Chancellor, it would seem to follow that the Vice-Chancellor retained, and that the Court of Appeal now has original jurisdiction. The same view seems to have been taken by the framer of the Act 14 & 15 Vict. c. 83, the 7th section of which Act transfers to the Court of Appeal in Chancery all the powers, authorities, and jurisdiction, *original* and *appellate*, given and granted to the Vice-Chancellors or any of

them under the Bankrupt Law Consolidation Act, 1849, or *otherwise had possessed or exercised* by the said Vice-Chancellors or any of them in matters of bankruptcy. This is a point which may be of practical importance, for the jurisdiction of the Court of Review was created by the 1 & 2 Will. IV. c. 56, by reference to the old and well-known jurisdiction of the Lord Chancellor, and there may be cases in which it may be convenient, or even necessary, to resort to this jurisdiction in the first instance, it being by no means clear that the jurisdiction given by the new Act to the Court of Bankruptcy is equally extensive. The principal case was not reported in its order, not having been considered at the time as deciding anything. It is now published, as it seems to have been understood as laying down generally, that the Court of Appeal has no original jurisdiction in Bankruptcy, a much more extensive proposition than was (as the reporter believes) intended to be settled by the case.

1852.

*Ex parte* HENRY MARTYN.

May 7.

In the Matter of EDWARD MARTYN and  
HENRY MARTYN.

**T**HIS was an appeal from the refusal by the Commissioner of the Appellants' certificate of conformity.

The bankrupts had carried on business as woollendrapers in partnership in *Aldgate High-street*, from the year 1839. On the 13th of *September* 1851, they were found bankrupts.

On the 2nd of *March* 1852, their application for their certificates came on to be heard, and the Commissioner refused to grant to either bankrupt a certificate or protection, on the grounds that their books had not been properly kept; that they had contracted debts fraudulently, by purchasing goods on credit for the purpose of raising money by pledging them; and that they had continued trading after they were hopelessly insolvent.

The bankrupt, *Henry Martyn*, appealed from this decision.

Mr. *Swanston* and Mr. *Roxburgh* were for the Appellant.

Mr. *Rolt* and Mr. *Bagley*, for the assignees.

The LORD JUSTICE KNIGHT BRUCE. .

The question is, whether there has been established against  
chased in the ordinary course of business, and had been pledged by reason of a sudden pressure requiring money to be raised forthwith, the Court allowed the bankrupts' certificates.

Before *The*  
LORDS JUSTICES.

Where a case is established of a trader having bought goods on credit, with the intent of raising money by pledging them, the Court will visit such conduct with the utmost severity; and the circumstance of goods which had been purchased on credit having been pledged the next day by the bankrupts is one open to suspicion.

Where, however, that circumstance was explained by uncontradicted evidence, showing that the goods had been pur-

1852.

*Ex parte*  
MARTYN.

against the Petitioner fraudulent conduct, or any course or act beyond imprudence or unskilfulness.

Where a case of fraudulent conduct is brought home to a man, and especially to a man in trade, the general interests of justice and of mankind (which are the same thing) require that it should be dealt with severely.

The alleged instances of such conduct urged on behalf of the assignees are these:—First, entries withheld from the books of the firm, not only with irregularity, but with bad intent. As to this part of the case, the defence relied upon is, that the Petitioner did not keep the books, but that they were kept by his elder brother, who was eight years older than himself, and was a partner in the business, and that the Petitioner was only twenty years of age when he commenced business. I do not find anything in the books, or in the evidence connected with the books, to satisfy me that there has been any fraudulent omission. It is true that the entries which relate to the exorbitant and oppressive interest paid by the partners for such loans of money as they required are made in a general way, without dates or particulars. It would have been better had it been otherwise; but upon the evidence I cannot ascribe this to fraud or bad intention.

Next, it is said that the bankrupts omitted to enter the sums which they owed for the goods supplied to them when they began business, as capital. This omission also, I think, cannot be attributed to wrong intention.

The third alleged ground is a very serious one; and, had the case as alleged been established against the Petitioner, no amount of severity which the Court could inflict



~~in~~ ~~fl~~ict would perhaps have been too great a punishment for it, namely, the offence of buying goods on ~~cre~~dit with the view and intention not of employing ~~the~~m in trade, but of pledging them. The time of the ~~pl~~edge in this case was so near the time of purchase as ~~ve~~ry reasonably and strongly to create suspicion. But ~~th~~ere is, on this point, evidence before us which was not ~~be~~fore the learned Commissioner. Upon the affidavit of ~~th~~e shopman, whom the assignees have not desired to ~~ex~~amine orally, it is impossible not to believe that the ~~go~~ods were bought not for the purpose of being pledged, but in the ordinary course of trade. The selection of ~~go~~ods so recently bought as those to be pledged is ~~ex~~plained by the foreman as arising from the convenience of their being ready packed and labelled. It ~~ap~~pears that in one instance the tradesman who supplied ~~th~~e goods wished the bankrupts to take more, and that ~~th~~ey refused, because they were not wanted for the purpose of business. The case, as it now appears on the evidence, is that there was a sudden pressure, rendering ~~it~~ necessary, in the view of the bankrupts, to resort to ~~pl~~edging goods to a person who had supplied them with ~~m~~oney before the goods were sold.

1852.  
*Ex parte*  
**MARTYN.**

There remains only this point, that the bankrupts ~~ha~~ve been in difficulties for a considerable time, which ~~th~~e younger brother ought to have known ; but he states ~~th~~at he did not keep the books, and was unaware of ~~th~~e state of the case, and I see no reason to disbelieve ~~hi~~m.

Considering the age of the Petitioner, which was ~~tw~~enty years only when he began business, and that he ~~ha~~s been without protection since last *February*, I think that substantial justice will be done by granting a certificate

1852.

*Ex parte*  
MARTYN.

tificate of the second class, to be dated eight months from the date of the adjudication.

*The LORD JUSTICE LORD CRANWORTH.*

I think it unnecessary for me to say anything except this, that it must not be thought that we dissent from the general opinion of the learned Commissioner, that the conduct of bankrupts ought to be visited with the utmost severity when they have been trading with fraudulent intention, as in purchasing goods on credit for the purpose of pledging them. I do not think this a case where there has been a fraudulent intention and I entirely concur in the judgment which has been given.

---

May 28.

*Ex parte* KENNEDY and Others.

In the Matter of JOHN ENTWISLE, a Bankrupt.

Before *The*  
LORDS JUSTICES.

Where there was joint estate to the amount of 13*l.*, held, that the joint creditors could not receive dividends from the separate estate until all the separate creditors were paid in full, although it did not appear that after payment of costs any part of the 13*l.* would remain for distribution.

THIS was the appeal of joint creditors of a firm, in which the bankrupt had been a partner, against the decision of Mr. Commissioner *Skirrow*, refusing to permit the Appellants to receive dividends out of the separate estate, before the separate creditors had been paid in full.

The bankrupt had been in partnership up to the 30th of *September* 1851, with one *Isaac Orrell*, but the partnership was dissolved as from that day by notice of dissolution, dated the 1st of *October* 1851, and gazetted on the 7th of *October*. A bond was then given by the bankrupt, dated the 1st of *October*, to *Isaac Orrell*, conditioned for payment of 607*l.* on demand. On the dissolution of the partnership there was no written contract; but,

**but**, according to the arrangement then made, the sole possession of all the partnership property was delivered to the bankrupt, who had the sole ownership of it afterwards, and continued the business on his own account, and in his own name, on the terms of paying all the partnership debts.

1852.  
  
*Ex parte*  
**KENNEDY.**

The bankrupt continued the separate trading until the 13th of *November* 1851, when the petition on which the adjudication was made was filed against him by one of his separate creditors, upon a declaration of insolvency. Afterwards *Orrell* became bankrupt.

Evidence was adduced by which the Commissioner held it to be proved that there was joint estate in hand for distribution amongst the joint creditors, to the amount of 13*l.* 4*s.* 5*d.*, consisting of book debts which had been collected by the official assignee, and he therefore held, that the joint creditors were not entitled to be admitted to receive dividends upon the separate estate of *Entwisle*, until his separate creditors had been paid.

Mr. *Swanston* and Mr. *Dickinson*, for the Appellants.

In order to exclude the rights of joint creditors to receive dividends from the separate estate, there must be a joint estate to some extent available for the purposes of a dividend. In this case the joint estate would be exhausted by costs, the portion of which payable out of the joint estate would no doubt exceed 13*l.* In *Ex parte Hill* (a), Lord *Eldon* said: "Joint effects mean such as are under the administration of assignees to distribute, not as in this case, where the only joint effects were those pledged to the petitioners to more than the amount." And in *Ex parte Peake* (b), Lord *Eldon* said, that if the joint property

(a) 2 *B. & P., N. R.*, 191,      *ley*, 2 *M. D. & D.* 354.  
 note; see also *Ex parte Bir-*      (b) 2 *Rose*, 54.

1852.

*Ex parte*  
KENNEDY.

perty were such that any attempt to realize it would be desperate, that would not exclude the joint creditors from receiving dividends out of the separate estate.

Mr. *Bacon* and Mr. *Smythe* were for the separate creditors.

Mr. *Aspland*, for the assignees.

The LORD JUSTICE KNIGHT BRUCE referred to an unreported case of *Ex parte Clay*, decided by Lord *Eldon*, in 1808, and mentioned in *Christian's Bankrupt Law* (a).

His

(a) Vol. II. p. 320. The following is the entry of the case in the Secretary's book:—

2nd May 1808.

In the Matter of JOHN BRIDGE and S. and G. KEALE, Bankrupts.

Whereas *Thomas Clay* of *Liverpool*, in the county of *Lancaster*, ironmonger, for and on behalf of himself and all other the joint creditors of the said bankrupts, did, on the 12th of *February* last, prefer his petition to me, showing that in Trinity term last, the Petitioner, presented to me his petition in the said bankruptcy, stating that a commission of bankrupt under the Great Seal of *Great Britain*, bearing date at *Westminster* on the 6th of *August* in the year of our Lord 1806, had been awarded and issued against the bankrupts, by name and description of *John Bridge* and *Henry Keale* late of *Liverpool*, in the county

of *Lancaster*, merchants and co-partners, under which they had been duly declared bankrupts, and *Joseph Ward* and *William Critchlow* of *Liverpool*, merchants, had been duly appointed assignees of their estate and effects, and an assignment of the same had been executed to them by the major part of the Commissioners in the said commission named and authorized; and by virtue thereof the said assignees had possessed themselves of the respective separate estate and effects of the said bankrupts, but that the assignees had not possessed themselves of any joint property, estate, or effects of the said bankrupts, there being no such joint property, estate, or effects in existence, the co-partnership between them having long since ceased, and the co-partnership effects having been long ago exhausted or divided between  
and

His Lordship requested the Registrar to look at the entry of this case in the Secretary's book, and unless the Petitioner's

1852.

*Ex parte*  
KENNEDY.

and received by them individually. That the Petitioner had, at a meeting of the said Commissioners, proved a debt under the said commission, owing to him from the said bankrupts in co-partnership, on their aforesaid co-partnership account, and several other persons had also proved joint debts under the same circumstances. That several persons had also proved, under the said commission, separate debts, owing from each of the said bankrupts individually to them on their separate account. That unless the Petitioner and the said several joint creditors were permitted to receive dividends equally with the said separate creditors from the separate estate and effects of each of the said bankrupts, they would be wholly remediless under the said commission, inasmuch as there were not any joint effects of the said bankrupts, and as the separate effects of the said bankrupts would not suffice to discharge his separate and individual debts. And the Petitioner therefore prayed that the said Commissioners might be directed to order dividends to be paid to him and to the said other joint creditors of the said bankrupts who had or should prove their debts under the said commission, from the separate estate and effects of

each of the said bankrupts equally with the separate creditors of each of the said bankrupts respectively who had or should prove their debts under the said commission, until satisfaction of their aforesaid debts, and that the costs of that application might be paid out of the said separate estates, or that I would make such other order therein as to me should seem proper. And the Petitioner further showed that an affidavit of the facts stated in the said petition was duly made by the said Petitioner and filed in support of the same, and that the said *John Bridge*, one of the said bankrupts, duly made and filed an affidavit in opposition thereto, and therein stated that in the year 1800 he the deponent *John Bridge*, together with the said *Henry Keale*, and with *Francis Stowell*, then deceased, purchased a brig called the *Will*, and that there were then partnership books provided for the said deponent and the said *Henry Keale*, in which the transactions of *Bridge*, *Keale*, and *Stowell* were entered; and that in the month of *August* 1801, the said deponent, together with the said *Henry Keale*, and *James Mozley* and *Robert Harrison* purchased a ship called the *Lady Frances*, and it was agreed between them that

1852.

*Ex parte*  
KENNEDY.

tioner's counsel should think it worth while, after referring to the entry, to have the principal case mentioned again, it

that he, the said deponent, should hold five-sixteenths, the said *Henry Keale* four-sixteenths, the said *James Mozley* four-sixteenths, and the said *Robert Harrison* three-sixteenths; and the said parties paid for the said ship in the aforesaid proportions, each supplying his own share of the advance, and also funds for the money bills, for the outfit in the like proportions; but when the credit bills for the outfit became payable, the said deponent paid a larger share of them than was his just proportion, and there then remained due as a proportion which ought to be paid by the said *James Mozely* to Messrs. *John Platt & Co.*, a sum of about 73*l.* for goods sold and delivered, and to the said deponent for over advances the sum of 180*l.* and upwards, and to the said deponent from the said *Robert Harrison* the sum of 9*l.* and upwards for over advance; and that the said *Francis Stowell*, after performing two voyages in the brig *Will*, sold his share of the said vessel to the said deponent, which made the interest of him the said deponent and the said *Henry Keale*, in the said brig equal, and there were then debts remaining due from the said last-mentioned ownery of *Bridge & Keale*, amounting to the sum

of 700*l.* and upwards, and there were no joint debts or other effects of the said partnership of *Bridge & Keale* except an old stool and map of small value, and except a debt of 250*l.* 11*s.* 8*d.* due from *Joseph Haile*, who was captain of the said last-mentioned brig, and had sailed as the said deponent had heard and believed, as master of a vessel from *America*; and the said deponent had heard that he occasionally sailed to *London*. And the said deponent further stated that the said debt had been owing for three years and upwards; and that the said deponent about the month of *March* 1804, caused a writ to be issued out against the said *Joseph Haile*, but he got to sea before it could be executed, and the said deponent had not since seen him or had any certain information respecting him, on which he could depend. And the Petitioners further showed, that on the said petition coming on for determination, the Lord High Chancellor, upon hearing the said petition read, and what was alleged by the counsel for the Petitioner, and also for the separate estate, and also for the assignees, ordered that the said petition should be, and the same was thereby dismissed. And the Petitioner further showed,

it was ordered, that the petition should be dismissed, and that the Petitioners should pay the costs of the opposing creditors, Messrs. *Walker*; and the assignees' costs should come out of the estate.

1852.  
*Ex parte*  
**KENNEDY.**

The case was not mentioned again.

showed, that the sum of 180*l.* and upwards, claimed in the said affidavit of the said bankrupt, to be due to his estate for overadvances on the ship *Lady Frances* therein mentioned, and of 9*l.* and upwards, therein also stated to be due from *Robert Harrison* to his estate, are, as the Petitioner is advised, the separate property of the estate of the said bankrupt *John Bridge*, and not the joint property of him and any other persons or person. That the old stool and map mentioned in the said affidavit as the property of the said bankrupts *Bridge* and *Keale* have been, since the said petition was so dismissed, sold fairly and *bond fide*, by public auction at *Liverpool* aforesaid, and produced the gross sum of 3*s.* 6*d.* only; and that the debt of 250*l.* 11*s.* 8*d.* therein mentioned to be due from *Joseph Haile*, was after the said petition had been so dismissed, fairly and *bond fide* sold by public auction at *Liverpool* aforesaid, after the same had been duly advertised for such sale in the *London Gazette* and *Liverpool* public newspapers in the usual manner, and that the same produced the gross sum of

9*l.* and no more; and that the expenses attending the aforesaid sales, and of a reasonable proportion of the charges of the said commission of bankruptcy, as affecting the said joint property, will exceed the proceeds of such sales; and the Petitioner is advised that said last mentioned debt of 250*l.* 11*s.* 8*d.* is, as appears from the said affidavit, a debt due to the said bankrupts *Bridge* and *Keale*, in their capacity of, and as surviving partners of *Francis Stowell* deceased, therein named; and that there are debts owing from them as such surviving partners, to a considerable amount; and that there are also debts owing from the said bankrupts *Bridge* and *Keale*, jointly, in their own right, and contracted since the said *Francis Stowell* ceased to be in co-partnership with them, to the amount of 700*l.* and upwards; and that there are no effects whatever of the said bankrupts *Bridge* and *Keale*, save and except the proceeds of the said stool and map; and therefore praying that the said Commissioners might be directed to order dividends to be paid to him and to the said other joint creditors of the said bankrupts

1852.  
*Ex parte*  
 KENNEDY.

rupts *Bridge & Keale*, who have already proved, or who should prove their respective debts under the said commission from the separate estate and effects of each of the said bankrupts, equally with the separate creditors of each of the said bankrupts respectively who had proved or should prove their debts under the said commission, until satisfaction of their aforesaid debts; and that the costs of this application might be paid out of the said separate estates, or that I would make such other order therein as to me should seem proper:—Now, upon hearing the petition read, and what was alleged by the counsel for the Petitioner, and also for the

assignees, and likewise separate creditors, I do order that the Petitioner is entitled to prove as against the said separate estates, and I do therefore dismiss the said petition. And I do order that the costs occasioned by this application to the said assignees out of the separate estates of the said bankrupts, and the separate creditors of the said bankrupts who appear in opposition to this and the said petition, be paid their costs by such several applications of the said separate creditors for the settlement of such respective costs by the said assignees if the parties are not agreed about the same.

June 4, 5, 7,  
 8, 9, 10.

*Ex parte* FRANCIS RUFFORD;

In the Matter of PHILIP RUFFORD, FRANK RUFFORD, and CHARLES JOHN WRAGGE

AND

*Ex parte* CHARLES JOHN WRAGGE, in the same Matter.

Before The  
 LORDS JUSTICES.

THESE were the appeals of two of the bankrupts from the refusal of their certificates of conformity

Where bankers continued

to trade for two years after they were hopelessly insolvent, *Held*, that the certificates had been properly refused; but by the consent of the assignees and of the creditors opposing the certificate, protection was granted to the bankrupts.

If bankers continue to receive deposits, knowing that if the business wound up they could not pay 5s. in the pound, that is a trading which is unjustifiable.

*Semhle*, that the effects of the misconduct of a banker are such as to distinguish his case from that of other traders upon his application for a certificate.



Sir *W. P. Wood*, Mr. *Atherton*, and Mr. *Renshaw* were for the Appellants.

1852.

*Ex parte*  
RUFFORD.

Mr. *Swanston* and Mr. *Huddleston* were for the assignees.

Mr. *Bacon*, for opposing creditors.

The following cases were referred to. *Ex parte Wakefield* (a), *Ex parte Dornford* (b), *Ex parte Holthouse* (c), *Ex parte Martyn* (d), *Ex parte Jardine* (e), and *Ex parte Sturt* (f).

*The LORD JUSTICE LORD CRANWORTH.*

This is a very distressing case, and if further consideration could in the contemplation of either my learned brother or myself have been of any use, or could have led us to come to a more satisfactory conclusion, we would have taken time to look into the examinations, which have been so very frequently called to our attention; but the truth is, that the question which we have to determine, is not one that depends on nice considerations of particular passages in letters. It was very proper that those details should be stated, but in our view the matter is to be decided on general principles.

The question is, whether these gentlemen, or either of them, should have their certificates under the 198th section. That section directs, "That the Court, having regard to the conformity of the bankrupt to the law of bankruptcy, and to his conduct as a trader, before as well as after his bankruptcy, and whether the allowance of

(a) 4 *De G. & S.* 18.

(d) *Ante*, p. 225.

(b) *Ibid.* 29.

(e) 1 *Fonb. Bank. Rep.* 182.

(c) 1 *De G. Mac. & G.* 237.

(f) 4 *De G. & S.* 49.

1852.  
*Ex parte*  
**RUFFORD.**

of such certificate be opposed by any creditor or not, shall judge of any objection against allowing such certificate, and either find the bankrupt entitled thereto and allow the same, or refuse or suspend the allowance thereof, or annex such condition thereto as the justice of the case may require." The learned Commissioner, having heard the case, finally refused the certificate; and against that decision the two bankrupts, Mr. *Francis Rufford* and Mr. *Wragge*, have appealed to us. The question is, whether they have made out a case to satisfy us that the decision of the Commissioner was wrong.

Now it is our duty, and certainly a very painful duty, to say that we entirely concur in the conclusion at which the Commissioner has arrived, as to both of these gentlemen. It was suggested, on the part of the bankrupts, that the learned Commissioner proceeded on the ground that one circumstance at least, requiring him to refuse the certificate, was the improvident and improper description of the investments, which the bankrupts made of the money held by them as bankers. It is unnecessary for us to consider how far those investments were of a character to warrant the course taken by the Commissioner, for we are clearly of opinion that, independently of those transactions, it was a sufficient ground for refusing the certificates, that the bankrupts had not so conducted themselves, according to the language of the statute, "as traders before their bankruptcy," as to warrant the granting of their certificates, but had, on the contrary, gravely misconducted themselves, in having improperly gone on trading and receiving deposits, long after a time when they must have known that they were totally and hopelessly insolvent. Sir *William Wood* said, that this is probably often the case with persons trading, who afterwards  
 retrieve

retrieve themselves, and against whom no imputation is ultimately established. I trust that that view of the case is in a great measure exaggerated by him, in the sanguine view which he naturally takes in vindicating the characters of his clients; but I must observe, that even supposing that occasionally to be done by traders who eventually set themselves right in the world again, that is no justification of such conduct, and least of all is it a justification of the conduct of bankers, because every one's experience must have shown, and every one's reason must have suggested to him, that the mischief and misery which is occasioned in a neighbourhood in which an extensive failure of a bank occurs, is of a character so distressing, that one shrinks from contemplating it. That appears to have been the case in the present instance.

1852.

*Ex parte*  
RUFFORD.

Therefore, what we have to direct our attention to is this: Upon the evidence does it appear that these bankers carry on the business of banking, after a time when they knew it to be impossible but that ultimate insolvency and ruin must be the consequence of their continuing to trade?

Now it appears, that, at the time of bankruptcy, there were assets to pay the debts of the *Stourbridge* Bank, to the extent, (not to speak very nicely,) of about 4s. or 4s. 6d. in the pound, and assets to pay the debts of the *Bromsgrove* Bank, to a much less amount; I think it is said 1s. in the pound. I am speaking of what would be the assets if it were not for the costs of the bankruptcy. Deducting the costs of the bankruptcy there is only about 2s. 6d. in the pound for the *Stourbridge* Bank, and less than 1s. for the other. The latter may not be a true way of estimating the amount, because we ought perhaps to consider what the assets are which the parties might

1852.

*Ex parte*  
RUFFORD.

might look to, and fairly consider applicable to the payment of their debts. But one cannot but see, looking at it in the most favourable light, that if bankers continue to receive money as deposits, knowing (as I think it is plain upon the evidence that both these Appellants did know) that when the business was wound up, there would not be more than 5s. in the pound, that is a trading utterly unjustifiable, and utterly unreasonable. That was the state of the assets at the time when the bankruptcy took place. There is, it seems, no reason to suppose that there was any material difference between the state of the assets in *June* 1851, when the bankruptcy took place, and their state in the latter part of 1849.

What was the state of the knowledge of the bankers as to these assets? Why, there is abundant evidence to show that the real truth of the case was perfectly manifest to the minds of both these gentlemen. In the month of *September* 1849, there being some difficulty with the *Glyns*, Mr. *Wragge* came up to *London*, and had communications with them; and then Mr. *Alger*, as the solicitor of the present bankrupts, and Mr. *Murray*, as the solicitor of the *Glyns*, were in communication together; and I collect, that, on the 18th *September* 1849, Mr. *Wragge* had an interview with the Messrs. *Glyn*, at which, after a good deal of remonstrance, at last the *London* bankers consented to make some further advances, or to relieve them from some embarrassment. This was evidently done with great reluctance, because on the 19th, Mr. *Wragge* wrote to Mr. *Rufford* thus:—“If *Mills* had been there it would not have been paid.” The meaning of this is: “We had great difficulty with the bankers to get them to help us. The most active person was absent, and therefore we had the good luck to succeed, but with great difficulty.”

That

That was the state of things in *September*. Early in *October*, I think on the 7th of *October*, Mr. *Wragge* having come down into the country, and at the instance of Messrs. *Glyn* looked into the affairs not only of the *Stourbridge* Bank, in which he was concerned, but the affairs of the other, wrote a letter, which has been often commented upon, and in which he says: "I cannot see my way without something important and immediate from the engine." What he refers to under the name of the engine was a patent right, which, in point of profit, was extremely doubtful. It is said to be an ingenious invention. Be it so; but to rely on that to make up the difference between paying 5*s.* in the pound, on the deposits of 227,000*l.* and 20*s.* in the pound, seems absurd. To use the expression that has been frequently mentioned, this might have enabled them to tide through a particular difficulty at the moment, but could not have eventually cleared them.

1852.  
*Ex parte*  
 RUFFORD.

Then the investigation into the affairs of the bank took place; various letters passed; and Messrs. *Glyn* pressed for further information, and wrote, saying, that they must have some explanation. I was much struck with the letter that passed from Mr. *Rufford* to Mr. *Wragge*, on the 12th of *October*, in which he says: "The letter of the 10th (that is, Messrs. *Glyn's* letter) must be answered with great care." What is the meaning of that? Coupling that intimation with the circumstances that precede and follow it, I cannot help saying that the meaning was, "Answer truly; do not tell a falsehood; but let there be such an answer as will lull to sleep, as far as it is possible, those suspicions which we cannot help seeing are already awakened." It is impossible not to come to that conclusion. The answer was accordingly written with great care. Although not a *suggestio falsi*, it was in one sense a *suppressio veri*; it

VOL. II. R D. M. G. did

1852.

*Ex parte*  
RUFFORD.

did not tell Messrs. *Glyn* that which I cannot but come to the conclusion both of them knew to be the then state of their affairs.

The correspondence continued with Messrs. *Glyn*, and by great exertion a little more security was obtained. A cousin was said to have helped them, but that cannot materially have altered the state of things ; and so they stood. At that time Mr. *Wragge* looked into the affairs, and the state of the affairs was, that there were about 225,000*l.* at *Stourbridge*, with only the means of paying from 4*s.* to 5*s.* in the pound, and a sum of about 227,000*l.* at *Bromsgrove*, with not the means of paying more than 1*s.* in the pound. That was the state of things at the end of 1849. What do they do ? Whether the name of fraud is to be given to their conduct or not I do not stop to inquire. They must, however, thenceforth have known that every pound of deposit which they received from poor people in the neighbourhood, or rich people, was a receipt of money, which they were taking in order to apply it to paying somebody else, with the perfect knowledge that if everybody chose to insist upon his own, not only there were not the means of paying it immediately off (for that might be the case with a perfectly solvent bank), but that there was not the remotest hope that when their affairs were wound up, there would be the means of paying anything like 20*s.* in the pound.

I do not wish to characterize harshly this course of conduct, but I must say that, continued as it was for a considerable time more than a year and a half, it is such as disentitles a trader to the benefit of a certificate.

It is said, that, by refusing the certificate, we are putting these Appellants in the same category as those who have committed the most grievous offence, and as one who

ha

**has** been guilty, as in the case of *Sturt* (a), of appropriating to himself a short bill that he ought to have kept in his box. It is also said, that it will confound these gentlemen with a person like *Holthouse* (b), who was guilty, if not of actual dishonesty and swindling, yet of something scarcely different from it. In one sense that is true. They are both of them punished, so far as the word punishment is properly applicable to such a course of proceeding—they are punished by the refusal of their certificate; but I am afraid that is a misfortune common to all laws that partake of anything penal in their character. It is impossible that punishment can be so assessed that there shall not be some persons sustaining the same *quantum* of punishment as others, when the quantity of moral crime or legal guilt may not be so great in one case as in the other.

1852.  
*Ex parte*  
**RUFORD.**

In truth, however, I cannot agree with Sir *William Wood* that this is to be dealt with exactly as if it were a mere punishment. The question is, whether, looking to the conduct of these parties as traders, they have so conducted themselves as to entitle them to the benefit of a certificate, so as to protect them from the claims of their creditors. It is true that in one sense it puts them in a painful position, but it is withholding from them a benefit which, if their conduct as traders had been good, they might have been entitled to ask, rather than imposing upon them a punishment.

I think it important, not merely with reference to the immediate case, but also with reference to the interests of society, to be affected and operated upon by example, that we should not cast any doubt on the judgment of the Commissioner, to whom, no doubt, it was painful to exercise this jurisdiction. It is important that we should not be considered as thinking him to be wrong in his view, that

(a) 4 *De G. & S.* 49.

(b) 1 *De G. Mac. & G.* 237.

1852.

*Ex parte*  
RUFFORD.

that the interests of society required, in cases like the present, the certificate to be refused.

What I have stated is the view which I take of the case with reference to both these bankrupts. It has been suggested, there were distinctions between one partner and the other—that the one was of a more sanguine temperament than the other. Those, however, are niceties with which it is impossible for us to deal. They were both communicating with each other, from day to day and from hour to hour, as to the state of their affairs. Letters passed, expressing hope on the part of one, less hope on the part of the other; but I cannot but come to the conclusion that both knew, if they chose to open their eyes, that in truth, if the thing came to be investigated, their affairs were absolutely desperate. And I am very much struck with one circumstance attending the examination of Mr. *Wragge*. It was said that the question was never asked of him, Did you believe there were the means of solvency? It is true that question was never in terms put; but it is impossible to read the questions which were put, and the answers that were given, without coming to the conclusion, as matter of absolute certainty, that he did not ever believe that there were the means of paying the debts which they were from time to time incurring.

As to the suggestion respecting protection, the assignees have said that they make no objection to it, as far as such protection can be given and be available. I am of opinion that we can only give it on their consent. To the extent to which they consent, we can have no difficulty, and shall be glad if it can be made available. It is not necessary for us to discuss how far it can be made available. It clearly would be available to the extent of any judgment to be obtained under the statute;  
and



**and** therefore to that extent it would operate. Whether **it** would operate on creditors not coming in by the **statute**, but under the common law right, seeking to take **the** bankrupts in execution, is a matter which we do not **speculate** upon.

1852.

*Ex parte*  
RUFFORD.

Our judgment, therefore, must be, simply to dismiss **this** appeal, qualifying the order in the way consented to **by** the assignees and the opposing creditors, namely, **that** the Appellants shall have protection so far as their **persons** are concerned.

*The* LORD JUSTICE KNIGHT BRUCE.

In acceding entirely to this conclusion, I wish to be **distinctly** understood as not departing from anything **said** or done by me in the case of *Dornford* (a), the case of *Johnson* (b), the case of *Wakefield* (c), or the case of *Martyn* (d). Had I been persuaded that there was any **error** on my part in any one of these four cases I hope **that** I should have been prompt to state it. But having, **since** the commencement of this argument, reconsidered **the** four, I adhere to every one of them as they were **decided** by myself. In *Dornford's* case, however, the **only** question before me was, whether the bankrupt had **been** too severely dealt with by the learned Commissioner, and my opinion was, that he had not been dealt **with** too severely.

The present case is importantly distinguishable from **each** of those four, but especially from the cases of *Johnson*, of *Wakefield*, and of *Martyn*; distinguishable in the circumstance that these gentlemen were bankers in a populous neighbourhood, and distinguishable also otherwise; though, perhaps, the first distinction is alone sufficient

(a) 4 De G. & S. 29.

(b) *Ib.* 25.

(c) *Ib.* 18.

(d) *Ante*, p. 225.

1852.

*Ex parte*  
RUFFORD.

ficient for every present purpose. The bankruptcy happened in the month of *June* 1851. It is not necessary to go farther back than a period some eighteen months or more before, namely, the autumn of the year 1849. I do not think that it would be in any sense of advantage to either of the Petitioners to go further back. Commencing, then, at the period I have mentioned, in the autumn of 1849, I have had to ask myself this question, Is it or is it not clearly proved that in the autumn of 1849 they were, upon a just and reasonable view and estimate of their assets, deeply insolvent? That question can, upon the evidence, be answered only in the affirmative.

Did they then at that time know the state of their affairs? Did they at that time know that they were insolvent? It may perhaps be a proper ingredient among the materials on which that question is to be answered, to consider what was their own estimate of the value of their assets, because they might in fact have been insolvent with an excusable ignorance of it on their part, from the circumstance that a portion of their assets might have been less valuable than they supposed it to be. I have endeavoured to answer that question to myself favourably for the Petitioners, but I have been utterly unable to do so; and I conceive that upon the actual evidence a reasonable man can only say that they were, in the autumn of 1849, thoroughly aware that the state of their assets was then such as that no word could represent it but insolvency.

Still there might have been, if I may use such an expression, a temporary insolvency, — there might have been an immediate and instant deficiency in their assets as compared with the amount of their debts, but there might have been a reasonable hope of improvement, —  
there

**there** might have been a reasonable hope of addition to **their** possessions,—there might have been a reasonable **hope** of assistance from friendly quarters which might **have** rendered them, if not justifiable, at least excusable, **in** continuing to transact business. I have looked in **vain** also for a favourable answer to that question, not **only** in the statements of the bankrupts themselves, but **in** the other evidence. I am convinced, not only that **as** reasonable men they could not have considered, but **that** in point of fact they did not consider, their situation **as** one of hope, as one affording any reasonable chance **of** surmounting their difficulties.

1852.

*Ex parte*  
RUFFORD.

This, then, was their state in 1849. They continued to carry on business, to issue notes payable to bearer on demand, and to receive deposits both from rich and poor, during the whole interval between that time, and, as I have stated, the month of *June* 1851. Then it has to be asked, Did their position, during any period of the interval improve? The answer is, No; an answer which includes this, that they were, during the whole of that period, deeply insolvent. Had they any reason to believe,—did they believe,—that during any part of the interval their position improved? Unfortunately this question must also be answered in the negative; and, upon that gentler estimate of their conduct which every man would wish to make, it may perhaps be attributed to weakness, to the fear of what may be called,—without intending to use the term in a harsh sense,—exposure. It may be attributed to that unwillingness to look into what is disagreeable or painful, which all men more or less feel. It is not necessary to characterize such a state of mind, or of action, by harsh words. Who in success and prosperity will venture to say what might have been his conduct, or what may be hereafter his conduct, under similar circumstances? Let him that thinketh he standeth

1852.

*Ex parte*  
RUFFORD.

standeth take heed lest he fall. But here the interests of society must preclude the influences of charity and self-distrust; the interests of society require that, for the purpose at least of administering civil justice, the matter must be dealt with as if these gentlemen had intended that which has been the effect of their conduct.

With unwillingness, therefore, but with a conviction that I am doing what is right, I concur entirely in the conclusion that has been stated. We accept readily the consent of the opponents of this petition to the grant of protection, which we hope may be effectual; but if it is not effectual, that matter must be dealt with hereafter, as it may be.

June 30.  
July 8, 10.

Before *The*  
LORDS JUSTICES.

A partner in a firm of two solicitors received monies belonging to the sister of the other, for the purpose of investment, and in a few instances without any specific security having been arranged. The usual charges of an attorney or solicitor were alone made upon the transactions. *Held*, that this did not amount to trading as a scrivener.

*Ex parte* ANTONINE DUFAUR.

In the Matter of ANTONINE DUFAUR.

THIS was the appeal of Mr. *Antonine Dufaur* against an adjudication finding him a bankrupt as a scrivener. He had carried on business with a Mr. *Blakeney* as attornies and solicitors, down to *March* 1851, when the partnership was dissolved.

The material facts appear sufficiently in the judgments.

Mr. *Swanston* and Mr. *Bagshawe* supported the appeal.

Mr. *Bacon* and Mr. *Cooke* opposed it, on behalf of creditors and the assignees.

*Ex*

Uncontradicted general evidence of a course of dealing amounting to scrivening is sufficient to warrant an adjudication without proof of specific acts.

*Ex parte Bath* (a), *Malkin v. Adams* (b), *Ex parte Peterson* (c), and *Hutchinson v. Gascoigne* (d), were referred to.

1852.

*Ex parte*  
DUFABUR.

The LORD JUSTICE LORD CRANWORTH.

July 10.

In this case the Petitioner, Mr. *Dufaur*, an attorney and solicitor of many years' standing, was adjudicated a bankrupt in *May* last, on the petition of Mrs. *Regan* and Mr. *Fogarty*, creditors for a sum of 79*l*.

He afterwards applied to the Commissioner to reverse the adjudication, on the ground that he never was a trader, subject to the bankrupt laws. In order to show that he was a trader, two of his former clerks were examined before the Commissioner, and they stated that which, if true, clearly in our judgment proved him to have been, in the language of the last Bankrupt Act, a person using the trade or profession of a scrivener, receiving other men's monies into his trust or custody, and so a person within the scope and object of the bankrupt laws. The result of the evidence to which we have referred is, that the sole, or at all events the principal business of Mr. *Dufaur*, was to receive monies from any person wishing to find investments, and then to place them out on securities, as occasions might offer. On the evidence as it stood before the Commissioner, we think that he arrived at the only conclusion it was possible for him to come to. For we cannot by any means yield to the suggestion made by counsel, that this general evidence of a course of dealing which amounts to scrivening, is insufficient to warrant an adjudication, without proof of specific acts. Mr. *Dufaur* did not tender himself for examination before the

(a) *Mont.* 82.

(c) 1 *Rose*, 402.

(b) 2 *Rose*, 28; 2 *V. & B.* 31.

(d) 1 *Holt*, 507.

1852.  
*Ex parte*  
 DUFAB.

the Commissioner, nor did he offer any evidence to contradict the examinations to which we have referred, and therefore all that the Commissioner had to consider, was the effect of those examinations. Mr. *Dufaur* demurred (so to say), to the effect of the evidence adduced against him, and his demurrer was necessarily and properly overruled.

Mr. *Dufaur* then presented the present petition, complaining of the decision of the Commissioner, and the question we have to decide is, whether Mr. *Dufaur* is entitled to have the adjudication reversed.

In the course of the argument before us, we at a very early stage of the proceedings expressed our regret that Mr. *Dufaur* did not request the Commissioner to examine him orally on the point in controversy; a course which we are persuaded the Commissioner would gladly and at once have adopted. This, however, was not done, and we consequently desired that such an examination might take place before us. Mr. *Dufaur* has accordingly been so examined, and the question is, what is the result of his examination, coupled with the other evidence?

The point to be established is, whether the petitioning creditors have shown to our satisfaction that Mr. *Dufaur* was in the language of the statute a person using the trade or profession of a scrivener, receiving other men's monies into his trust or custody.

The difficulty of deciding this and similar questions arises, as has often been pointed out, from the circumstance, that the trade or profession of a scrivener receiving other men's monies into his trust or custody, rarely, probably never, now exists as an independent trade  
 or

or profession. It has become practically united, in the course of the last two centuries, partly with the business of a banker, partly with the profession of an attorney or solicitor. Bankers are now by an express enactment made subject to the bankrupt laws; and therefore, in the case of a banker, it is now immaterial to consider whether he is also liable to the bankrupt laws as a scrivener. But with respect to attorneys, the case is different: an attorney in his character of attorney is certainly not liable to the operation of those laws; and it often therefore becomes very important to consider whether he is liable as a scrivener; and in all such cases the question is, whether he has habitually, and as part of his ordinary means of seeking a livelihood, received into his hands the monies of others in order to invest the same profitably for the depositor, looking for his remuneration either to procur-ation on the advances, or to reward in some other mode for his services in obtaining and making the investment. The point was fully considered in the case of *Ex parte Malkin*, reported first before Lord *Eldon* (a), when he directed an issue, and afterwards in a charge of *Gibbs*, C.J., given on the trial of the issue and reported (b). From these authorities the whole doctrine on this subject is to be collected; and I should not feel myself warranted in questioning the soundness of the law as propounded in that case, even if I doubted, which I do not, its accuracy.

1852.

*Ex parte*  
DUFAY.

The only question therefore is, whether on this view of the law it is made out that Mr. *Dufaur* was a scrivener, or, according to the designation contained in the issue directed by Lord *Eldon*, a money-scrivener, within the meaning of the bankrupt laws.

The

(a) 2 *Ves. & B.* 31.(b) 3 *Camp.* 534; 2 *Rose*, 28.

1852.  
*Ex parte*  
 DUFAB.

The evidence does not seem to us to prove more than this. On various occasions in and after the year 1844 or 1848, Mr. *Dufaur* and his then partner Mr. *Blakeney* received several sums of money belonging to Mr. *Brown*, whose husband had died in 1847, and from time to time lent them on mortgage and other securities. Mr. *Dufaur* and Mr. *Blakeney*, in all these transactions made the usual charges as attornies or solicitors, but they made no other charge. On occasion of most of the investments, the security had been arranged before the money came to the hands of Messrs. *Dufaur & Blakeney*; but on one or two occasions this was not so, but the money was in their hands, in order that they or rather that Mr. *Dufaur*, might look out for some eligible mode of investment.

It was stated in the examination before the Commissioner, that money of other persons was often placed in the hands of *Dufaur & Blakeney* in the same way that of Mrs. *Brown*; and the same thing was, to some extent, stated orally by Mr. *Dolman*, the solicitor of the petitioning creditors, and who was formerly a clerk of Mr. *Dufaur*. But no other specific instance of such a transaction was proved; and Mr. *Dufaur*, on his own examination before us, stated positively that no money (excluding the case of Mrs. *Brown*) ever came to his hands for investment, except where the security had been already prepared or agreed on, and when the money, if paid to him, or to him and his partner, was only so paid in order that it might be handed over to the borrower when the securities should be completed. In such a case it is obvious that the money never was in the hands of the bankrupt otherwise than as an agent, for the purpose of paying it over on the proper occasion. In the absence of all conflicting evidence as to particular instances, we give credit to this testimony of Mr. *Dufaur*.



*Dufaur* as a correct representation of the facts, and it obviously follows, that unless the dealings with Mrs. *Brown's* money make Mr. *Dufaur* a scrivener, there is nothing to fix on him such a character.

1852.

*Ex parte*  
DUFABUR.

We are both of opinion that what is proved as to Mrs. *Brown* does not bring Mr. *Dufaur* within the operation of the bankrupt laws. For in the first place, Mrs. *Brown* stood in a relation towards the firm different from that of persons in general: she was the sister of Mr. *Blakeney*, and her husband had formerly been the partner of Mr. *Dufaur*. Great intimacy naturally subsisted between them, and Mrs. *Brown* appears to have very much thrown herself on Mr. *Dufaur* to do the best he could for her in relation to her pecuniary affairs. Under these circumstances, even if in every instance the investments made for her had been so made out of money left in the hands of the bankrupt for the purpose of being laid out at his discretion, we should have hesitated before coming to the conclusion that such conduct was sufficient to make the deposittee of the money a money-scrivener. *Gibbs*, C. J., in his exposition of the law, says this:—"Nor if on one or two occasions money were deposited with him to lay out, would that constitute him a money-scrivener. He must be carrying on generally the business of a money-scrivener. That must be part of his known occupation" (a). And then he cites the following passage from a judgment of Lord *Eldon* in *Ex parte Paterson* (b), where one question was, whether the alleged bankrupt was liable to the bankrupt laws as a scrivener. Lord *Eldon* says: "Next, as to the trading as scrivener. That does not depend upon the fact whether the bankrupt

(a) 3 *Camp.* 540.

(b) 1 *Rose*, 405.

1852.  
*Ex parte*  
DUFAY.

rupt has or has not occasionally done acts which scrivener peculiarly and properly would have done; not upon what he may have done upon one day and what upon another, but upon his intention generally to get living by so doing." Now, guiding myself by this, as conceive, clear and safe test, I have come to the conclusion that the facts proved do not make out that "the business of a money-scrivener was part of the general occupation of Mr. *Dufay*," or that "he had any intention generally to get a living by so doing."

The few instances in which money of Mrs. *Brown* was in his hands for the general purpose of enabling him to invest it as he might think fit, were evidently exceptions to the general course of dealing. They were so few as not to afford any sufficient evidence of general intention; and even if they had been much more numerous, still the relation of Mrs. *Brown*, the depositor to Mr. *Dufay* and his partner, was such as to make it unsafe to draw any general conclusion as to what was the course and nature of the dealings carried on or contemplated between Mr. *Dufay* and the rest of the world.

The conclusion, therefore, at which we have arrived on evidence not before the Commissioner, is, that Mr. *Dufay* was not a scrivener within the true intent and meaning of the bankrupt laws, and so not the fit object of a petition for adjudication; and the consequence is, that the adjudication must be set aside.

The view we have thus taken makes it unnecessary for us to express any opinion whether, in order to bring an attorney within the operation of the bankrupt law as a scrivener, it must not be shown that he actually charged commission for laying out money as well as fee  
fo

for drawing conveyances, according to the language attributed to Lord *Eldon*, in a short report of *Malkin's case*, to be found in a note to *Ex parte Paterson* (a); or whether, according to the report of the charge of *Gibbs*, C. J., as given by Sir *George Rose*, in the 2nd volume of his Reports (b), if the attorney is intrusted with the money, it matters not what form of charge he adopts for his remuneration. I think it, however, clear that no one can be made a bankrupt as a money-scriver, unless he has in some way obtained or sought profit from that occupation, whatever other business he may have been engaged in.

1852.  
*Ex parte*  
 DUFAB.

Both parties desired that we should decide this question ourselves, without putting it in a train for legal investigation, and we have therefore not considered the point whether, if no such desire had been expressed, we should have thought it expedient to decide the matter at once, or to direct an issue, or to leave the bankrupt to bring his action.

The adjudication will be set aside; but we shall give Mr. *Dufaur* no costs, for we feel a strong conviction that if he had tendered himself for examination to the Commissioner, that learned person would have taken the same view of the facts with ourselves, and so that a great deal of unnecessary expense would have been avoided. We also make it a condition of our annulling the adjudication, that Mr. *Dufaur* shall bring no action against the petitioning creditors, the messenger, or any parties concerned. Unless he consents to this, the adjudication must stand, and Mr. *Dufaur* be left to his legal remedies.

*The* LORD JUSTICE KNIGHT BRUCE.

Considering that the only possible objection to the validity

(a) 1 *Rose*, 406.

(b) Page 32.

1852.  
*Ex parte*  
 DUFAUR.

validity of the proceedings which this petition seeks to impeach is, that the Petitioner is not nor has been a scrivener within the meaning of the bankrupt law,—considering also, that probably or certainly the Petitioner is in a state of insolvency, and that the materials before the learned Commissioner rendered his conclusion correct,—and considering the manner in which the Petitioner appears to have been conducting himself,—I was at one time disposed not to interfere in his favour, unless he should establish himself by means of an action at law not to be legally a bankrupt. Upon reflection, however, sincerity obliging me to own that, upon my view of the whole evidence now before us, the Petitioner has not been shown to be or have been a scrivener within the meaning of the bankrupt law, and that I do not see probability of any useful addition to that evidence being obtained, I think that the continuance of a state of bankruptcy against him cannot be justified upon judicial principles.

He can have no costs, and he must undertake not to bring any action. I wish, by way of explanation, to add that I take the law which is to be applied to the facts of this case rather from decision than from my own view independently of decision,—a view which would probably have induced me to hold Mr. *Dufaur* legally a bankrupt. But so to hold him upon the evidence as it exists would be, I conceive, to contradict not merely authority worthy of great deference, and of great weight, but authority by which I ought to consider myself bound.

1852.

*Ex parte* THOMAS STEPHEN CURTIES.

July 17, 21,  
22.

**In** the Matter of THOMAS STEPHEN CURTIES,  
a Bankrupt.

**T**HIS was the appeal of the bankrupt from the refusal of his certificate.

Before *The*  
LORDS JUSTICES.

The bankrupt had carried on business originally as a linendraper, but afterwards as a wholesale cheesemonger. The particulars of his conduct are sufficiently stated in the judgment.

Where a bankrupt, who stopped payment on a Monday, had on the previous Saturday made purchases of goods, *Held*, that upon his application for his certificate, it was incumbent upon him satisfactorily to explain the circumstance; and, upon his giving an explanation which was incredible; and upon it appearing that he had twice before compounded with his creditors,

Mr. *Swanston* and Mr. *Roxburgh* supported the appeal.

Mr. *Malins*, Mr. *Bagley*, and Mr. *Bury*, opposed it, on behalf of the assignees.

Mr. *Swanston* was heard in reply.

*The* LORD JUSTICE KNIGHT BRUCE.

This is a case of certificate arising necessarily on one or more of the sections of the Act consolidating the law of bankruptcy, of which, without entering into the 201st and 256th sections, it will be sufficient to refer to the 198th,

and on this occasion wished to effect a third composition for 11s. in the pound, his assets being sufficient to pay 12s. in the pound; and upon it further appearing that he had made fictitious entries in his books, *Held*, that his certificate had been properly refused.

*Held*, also, that the question in such a case is not so much one of punishment as one of immunity, the question being, whether a trader who has so conducted himself shall be permitted to resume trading without paying his creditors.

1852.  
 {  
*Ex parte*  
 CURTIS.

198th, directing that the Court, "having regard to the conformity of the bankrupt to the law of bankruptcy, and to his conduct as a trader before as well as after his bankruptcy, and whether the allowance of such certificate be opposed by any creditor or not, shall judge of any objection against allowing such certificate, and either find the bankrupt entitled thereto, and allow the same or refuse or suspend the allowance thereof, or annex such conditions thereto as the justice of the case may require." The discretion thus reposed in the Court which has to judge upon the matter is (as Mr. *Swanston* truly says) not an unlimited discretion, but a discretion to be exercised on judicial grounds with reference to the particular nature and circumstances of each case; and perhaps, above all, the Court's discretion is to be regulated, if not restricted, by regard to the conduct of the bankrupt as a trader before as well as after his bankruptcy. The question before us is, whether, having regard to the conduct of the bankrupt as a trader before as well as after his bankruptcy, it is or is not fit that he should receive from this Court a passport (so to speak) into the world of commerce, enabling him to recommence operations as a trader before fulfilling the condition of paying the debts now due from him.

The conduct of the bankrupt as a trader has been impeached on several grounds: first, that when he was about suspending his payments, was intending stoppage and composition with his creditors on the morning of the 27th of *October*, he had on the preceding Saturday purchased goods of tradesmen, for which he did not pay and has never paid; and it is contended that his purchase of these goods on the Saturday, followed by the almost immediate stoppage on the forenoon of the Monday, was conduct unfair, untradesmanlike, and disreputable. *Primâ facie* it was so, and it lies on the bankrupt to explain

explain such a state of things. He says, that although within less than twenty-four hours in one sense, and forty-eight hours in every sense, after the purchases, he proceeded to effect a composition, yet he intended on Saturday nothing of the kind; that he bought the goods in the ordinary course of business, and that he intended to continue his trade; but that on Monday morning, so early as nine o'clock, he received an invoice of one parcel of the goods from one of the tradesmen whom he has thus used, which, by the deduction of discount, showed that the tradesman expected immediate payment. The invoice appears not to have been accompanied by a letter, but the bankrupt inferred, as he says, that no further supplies were to be expected from that quarter without immediate payment. In this instance there was no demand of payment, no pressure either for that or a much larger sum due from him to the same creditor on another account. The amount of the invoice was under 28*l.*, but he says that it had such an effect upon him, as indicating an intention of this particular creditor not to deal any longer on credit, and moreover, that he was so short of supplies, and that his trade so much depended on this tradesman, that the receipt of the invoice induced him to resolve at once to come to a stoppage. Now certainly this is a most extraordinary statement, and one, though not absolutely impossible to be true, yet so improbable that it requires a very great stretch of credulity to believe it. It is curious, too, that in his position he should have desired to stop payment or compound with his creditors, for it is plain he had the means of paying at least 12*s.* in the pound,—indeed he shortly afterwards offered to pay 11*s.* in the pound. The whole affair wears a most mysterious aspect, for which one cannot account without resorting to the early history of this gentleman. It appears that in 1831, being then

1852.

*Ex parte*  
CURTIS.

1852.  
  
*Ex parte*  
CURTIES.

a linendraper, or recently an apprentice to a linendraper, at *Worthing*, and just out of his time, he married a lady of some fortune, in his own rank of life. The fortune which she had appears to have been something less than 1000*l.* but more than 800*l.*, a good fortune for his rank in life. Of this a sum of 500*l.* was settled strictly, and is not now in question. There was no other settlement, and the rest of the fortune came into the bankrupt's possession; but he says that though there was a formal deed of settlement only as to 500*l.*, there was some further agreement or understanding between him and his wife, that he was to be a debtor for the fortune beyond the 500*l.* Whether that is to be believed depends on the circumstances of the case and his conduct. He appears on this occasion, with the aid of his wife's fortune, to have changed his line of trade, and to have taken to the bacon and cheese trade, in which he was not long outwardly prosperous, for in 1836 he stopped payment, and paid 10*s.* in the pound. That was the conclusion of the first cycle of his trading existence. Afterwards he went on for some years without entering into any composition, but in 1847 he came to a second composition, and paid 9*s.* in the pound. The ensuing period of trade is not so long, because the time for the third composition appears to have arrived in the autumn of 1851. Now, looking back to these facts, to which others might be added, some light dawns upon the otherwise mysterious circumstance of a man in his position, with regard to property, desiring to stop business and compound with his creditors. I have endeavoured to the utmost to account satisfactorily to my own mind for his conduct with respect to this third composition, I have failed in the attempt, and I regret to say that I am unable to give credit to the reasons which he assigns.

This



**This** is not all. He did not at this stage contemplate bankruptcy, he intended to effect his object (whatever that was) by a composition, but his creditors not wishing to accept 11s. in the pound, he was made bankrupt, and his books and documents have undergone an adverse inspection. From the ledger he seems to have abstracted four pages, or two leaves; these he says were taken out by himself. The knife also has been in use at more than one place in the book, and must be taken to have been so used by himself; but what makes the matter the subject of graver consideration is, that the abstracted leaves and the erasures are all accompanied by suspicious accounts in the same book, to which I must now advert. The book contains at least four fictitious accounts, that is, they are accounts headed with names of persons with whom he had had no dealing. This is not denied, but the allegation upon his part is, that the transactions were real and fair though ascribed to names to which they did not belong, and his explanation is, that this form of account was merely adopted because he did not desire his clerks to know what his affairs were.

1852.  
 Ex parte  
 CURTIS.

One of the accounts is ascribed to a person of the name of *Payne*, making *Payne* a creditor to the extent of 200*l.* That is admitted to be fictitious in every sense; but the bankrupt explains it thus: "I say, that previously to the 10th day of *January* 1848, I had saved 200*l.* from the sale of bacon wrappers, empty hogsheads, and preferences on composition with my creditors, which I had kept apart from my business as a private fund, but then wanting the amount in my business, I entered the same in my books under the head of *John Payne*." The phrase "preferences on compositions" is one which I never before heard. Of the other three accounts, one is a closed account, entered in  
 the

1852.

*Ex parte*  
CURTIES.

the name of *Maria Curties*, the mother of the bankrupt. Of the other two, being open accounts, one is with Mr. *Webberley* the brother-in-law of the bankrupt, the other with Mr. *Pointon* his cousin. These three accounts are all of them fictitious in point of names, but he says they were honest accounts, thus entered for the purpose of concealment from his clerks, and he says that the money all belonged to his wife. There is no pretence for saying that it belonged to her for her separate use; but it is said by Mr. *Swanston*, and said truly, that the bankrupt and his wife may have so considered it, and that this would remove any imputation of dishonest intention. Let us see how the case stands in this respect. The sum of 400*l.* seems the utmost that could have been thus received. The sums carried to the two accounts with *Webberley* and *Pointon* amount to 1100*l.* Now that certainly is a great amount of accumulation on 350*l.* or 400*l.*, the remainder of her fortune not in settlement. This is attempted to be accounted for by the interest on the 500*l.*, and upon other money accrued due in her right, and by her savings from the expenses of the household which (it is no more than justice to say) appears to have been conducted with sufficient economy as far as our information goes. It is, however, impossible that a history of this description should be presented to the mind of any reasonable being, conversant with the affairs of mankind, without explanation being required. I agree that the improbable is not always the untrue, and I agree that innocent men have been convicted on circumstantial evidence, apparently satisfactory, but which has afterwards been found to have led to an erroneous conclusion. Still, in human affairs, those who have to determine on questions of fact, must found their judgment on the credibility of evidence, must form the best judgment which they can, such questions

tions being unsusceptible of mathematical demonstration. They cannot decline to act by reason of the chance of error incident to the subject.

1852.

*Ex parte*  
CURTIS.

Viewing the case in that way, I am unable to come to the conclusion that this history is credible: I do not think it so.

The matter does not rest here. This tradesman, when he resolved on stoppage and composition, employed an accountant named *Glover* to make up his books. In the course of the communications which passed between *Glover* and himself, it appears that these accounts struck *Glover* as something unusual, but it does not appear that the bankrupt then explained to him that the accounts to which I have referred were fictitious. On the contrary, he led Mr. *Glover* to believe that they were true and honest accounts with real persons.

The matter does not even thus end. There appeared in the account under the name of *Webberley*, on the 27th of *October* 1851, a cheque debited to *Webberley* in part payment of the apparent debt due to him. This date naturally struck the accountant as being on the day of the stoppage, and he remonstrated. The bankrupt, however, for a time maintained its propriety, and insisted that it ought to stand, but ultimately gave way. On the 27th of *October*, when he had resolved on stoppage, he drew a cheque in the name of *Webberley* and dated it on the preceding Friday, and when questioned, was unable to give a reason why the name of *Webberley* was placed on the cheque, or why it was so dated.

Other circumstances might be noticed; but without laying stress on more minute facts, I find those which I have already mentioned before me, and I am asked, in the

1852.

*Ex parte*  
CURTIES.

the exercise of the judicial discretion of a tribunal, having to a certain extent the judicial administration of the affairs of commerce, to give the passport of such a tribunal to this man, to enable him to enter again into trade. I am surprised that the application should have been made to a court of justice, with the sanction of any disinterested adviser, conversant with the facts of the case. It is a demand without a pretext; it is a demand without colour, and I do not recollect a case where a certificate has been asked in which there were more plain, palpable, and irresistible grounds for refusal. For my part, and so far as my judgment is concerned, I dismiss the petition, refuse the certificate, and refuse any protection whatever.

*The* LORD JUSTICE LORD CRANWORTH.

I entirely concur in the conclusion at which my learned brother has arrived. It would be a waste of time to point out all the various conclusive evidences of untruth in the statements which have been made. The story appears to me utterly incredible. The question is not as to the proper quantity of punishment to be inflicted upon the bankrupt, but whether this Court ought to sanction the re-entry of the bankrupt into business, without his having previously paid his debts in full. The petition must be dismissed, and with costs, and all protection be refused. The Respondent's costs, so far as they are not obtained from the bankrupt, must come out of the estate.

---

1852.

*Ex parte* GEORGE STANER.

July 24.

In the Matter of GEORGE STANER, a Bankrupt.

**T**HIS was the appeal of a bankrupt from the refusal of his certificate by Mr. Commissioner *Holroyd*. The bankrupt carried on business at *Margate* as a baker. On the hearing of his application for his certificate, an opposing creditor named *Jay* stated that the bankrupt obtained 450*l.* from him on pretence that it was to be laid out on mortgage, whereas in truth no mortgage had ever been in contemplation. The bankrupt had also borrowed a sum of 200*l.* from a Mrs. *Fife* under similar circumstances. The particulars of these transactions are stated in the judgment of the Lord Justice Lord *Cranworth*.

Mr. *Cooke*, in support of the appeal.

Assuming the allegation of the opposing creditor to be true, the conduct of the bankrupt would not have been conduct as a trader "within the meaning of the Act :—" *Ex parte Wakefield* (a), and *Ex parte Spicer* (b). Moreover, according to the allegation, the transactions in question took place before the new statute came into operation. There are no words in the Act directing that it shall operate retrospectively, so as to render a past act an offence within the meaning of the 256th section. Independently of these considerations, the fraud is altogether displaced by the evidence in the case.

Mr. *Jay* and a daughter of Mrs. *Fife* were examined before the Court orally, as was also the bankrupt.

Mr.

(a) 4 *De G. & S.* 18.

(b) 3 *De G. & S.* 601.

Before *The*  
LORDS JUSTICES.

A trader who obtains money on false pretences, though not in the course of his trade. *Held* to have misconducted himself as a trader with reference to his certificate.

Misconduct as a trader before the 12 & 13 *Vict. c.* 106 came into operation may be properly regarded upon an application for a certificate under that Act.

1852.  
 {  
*Ex parte*  
 STANER.

Mr. *Bacon* and Mr. *Bagley*, for the opposing creditors, and

Mr. *J. T. Wood*, for the assignees, were not called upon.

*The* LORD JUSTICE LORD CRANWORTH.

This is another of those distressing cases with which we have to deal. It is an appeal from the decision of the Commissioner, upon an application for a certificate, which he thought it his duty to refuse. I think the Commissioner's decision right on several grounds. In the first place, before the bankrupt can ask for a certificate, he must have conformed to the bankrupt law since his bankruptcy; he must have stated the truth and the whole truth respecting his estate, and I do not shrink from saying that here he has not done so. I do not believe the statement which he has made.

There were two transactions relative to loans brought in question. The first was that of Mr. *Jay*. Mr. *Jay* says that he advanced his money to *Staner* originally on an undertaking that it should be invested on security; he says that, in a letter which is now lost, *Staner* told him that it was to be invested on a mortgage of an estate of a Mr. *Petley*, but that after many inquiries made by him, and many excuses made by *Staner*, the latter called on Mr. *Jay*, and told him the mortgage was at length completed, but he added that it was taken for 700*l.* or more, and that as he (the bankrupt) had advanced the greater proportion of the money, he would retain the mortgage in his own hands, and give Mr. *Jay* a security on his own property, to which Mr. *Jay*, it is said, acceded. It is immaterial to consider whether that did or did not absolve the bankrupt from the former engagement. But the purpose for which I wish to

to consider it is this: What was the true transaction? If what the bankrupt has stated to be the true transaction is not so, then he has been deliberately stating what he knew to be untrue. Mr. *Jay* says it was a contract for a mortgage for Mr. *Petley*. The bankrupt says it was a loan to him on his promissory note. Looking at the documents, which statement do they bear out?

1852.

*Ex parte*  
STANER.

[His Lordship adverted to the evidence on this point, and read the following passage from a letter of the bankrupt to Mr. *Jay* :]—"I take it for granted you will have the money on Friday. The security, you may rest assured, is of the most desirable character, or you should not have the investment. Leave that to me." [His Lordship then continued :]—Now these are terms utterly irreconcilable with the notion that he was borrowing the money merely on his own personal security. Upon the whole evidence I come to the conclusion that *Jay* is a person to be believed, and that the bankrupt is to be disbelieved.

If the case rested on the evidence of *Jay* alone, I should have come to the conclusion that the bankrupt had wilfully intended to deceive his assignees, and the parties interested in his estate, and had not conformed to the bankrupt laws. But the case does not rest here: another transaction, of a similar character to the former, took place between the bankrupt and a Mrs. *Fife*; and in this instance also we have had the advantage of seeing the demeanour and hearing the statement of Miss *Fife* and the bankrupt, and we have had the affidavit of her mother, Mrs. *Fife*, who cannot be examined here orally, on account of her illness. The bankrupt, who knows the evidence which she gave before the Commissioners, and is probably aware that her cross-examination

1852.

*Ex parte*  
STANER.

examination would not be favourable to him, did not wish that the matter should be delayed on that account. Now, what is the account given by the mother in her affidavit, and in a very straightforward manner by the young woman here to-day? Mrs. *Fife* had lost her husband, who died in 1849, leaving a little money about 200*l.*, in the house. *Staner* had known the husband at *Margate*, and took, or professed to take, some interest in him and his family; and the widow and her daughter supposed him to be their only friend. He tendered his advice to them, and appointed to meet them at the *London* terminus of the *Blackwall* Railway. They went, and *Staner* asked them in what circumstances they were left, and was told that they had 200*l.*, and that was more money than they liked to have in the house. He said that it was unlucky he had not known sooner, as he could have got it invested; that a Mr. *Powell*, of *Quex-park*, was just dead, that the *Collins's* were therefore in want of money, and that he could have got 5*l.* per cent. He asked them how long it would take them to get the money, as perhaps it was not too late. He then promised to wait while they went for the money, and in the meantime to see if he could manage the matter. They went and got the money, and on their returning with it, he said he had seen the party and was happy to say it was not too late, and that he could put the money to work directly. Then, relying upon him and his friendship, they put their all into his hands; he took it and went away.

The bankrupt denies all this, and that there was to be any security, except his own personal security. It is utterly incredible that the story told by the daughter of Mrs. *Fife* can be an invention; and it is strongly corroborated by the mode in which the bankrupt himself has



has answered the questions put to him regarding it. At first he said he did not recollect it. Now he must have recollected it if it had occurred, and if it had been untrue he would at once have contradicted it. When pressed with further questions, he seemed to feel his position, and then he denied the story to be true. We have the duty cast upon us, in this case, of saying whether we disbelieve this young woman, supported as she is by the affidavit of her mother (too ill to be examined), or pay no attention to the oath of the bankrupt. I have no hesitation in saying that, in my opinion, the bankrupt has told a deliberate and intentional falsehood, and that on that ground alone the certificate has been most properly refused him.

1852.

*Ex parte*  
STANER.

*The LORD JUSTICE KNIGHT BRUCE.*

The agreement of Lord *Cranworth*, with the decision of the learned Commissioner, would be an affirmance of it, whatever might be my own opinion. I think it right, however, not to abstain from stating what my opinion is. First, as to the law. It has been suggested, by Mr. *Cooke*, that even if the case set up by the opposing creditors were made out, it does not fall within the 256th section of the Bankrupt Act of 1849, because the particular facts occurred before that statute. For this no decision was cited; and considering the learning and experience of Mr. *Cooke*, I think I may take it that none exists; and I state my opinion to be, that if this case comes otherwise within the Act of Parliament, it is not the less so because the conduct complained of took place before the passing of the statute.

Another observation made was, that the debt was not fraudulently contracted by the bankrupt in his trade,  
and

1852.  
 {  
*Ex parte*  
 STANER.

and that, therefore, it was not conduct in a trader within the meaning of the Bankrupt Act, and for this my decision in *Wakefield's case* (a) was referred to and relied upon. My impression is different as to the effect of that case; I think that conduct of a trader, showing him to be unworthy of that degree of estimation which ought to belong to one engaged in the transactions of commerce, or indeed in any other transactions of life, may be conduct within the Act—though not conduct actually in trade. If in *Wakefield's case* (a) I said anything contrary to this, I was wrong; but I do not think that I did.

So far as to the law. There are two acts of the bankrupt impeached. How the matter would have stood if *Jay's case* had been the only one against the bankrupt, I will not give an opinion, because it is not necessary; but I am satisfied on the evidence, so far as any one can be satisfied on the comparison of a conflict of testimony by adverse witnesses, that the money of Mrs. *Fife* was obtained from her unfairly, improperly, fraudulently. A state of things was represented to the two ladies which did not exist; they were ignorant (I do not use the term in an offensive sense) and helpless women, whom this tradesman, who professed to be their friend, ought to have assisted, advised, and supported, and if he saw them about to commit an act of imprudence, he ought to have prevented them; at all events, he ought to have told them the truth. He allowed them, however, and caused them to part with their money under a mistake and misapprehension wilfully created by himself for his own selfish purposes. I come to the conclusion, upon the evidence, that the bankrupt contracted

(a) 4 *De G. & S.* 18.

tracted a debt with Mrs. *Fife* by fraud and on false pretences. Considering that I come to that conclusion, and considering the 256th section of the Bankrupt Act, I am to ask myself whether a man capable of committing this single act as to these women, is worthy to receive what I have called a passport to enter into trade again without paying his debts. I am of opinion that he is not ; and on the ground of his conduct to these helpless women alone I refuse him his certificate.

1852.

*Ex parte*  
STANER.

Let the petition be dismissed, and the costs of the assignees and opposing creditors come out of the estate.

*Ex parte* SIDNEY SHERLOCK.

July 28.

In the Matter of SIDNEY SHERLOCK, a Bankrupt.

THIS was the appeal of the bankrupt from the refusal of his certificate by Mr. Commissioner *Stevenson*. One ground of the appeal was, that the Commissioner had no jurisdiction to appoint a sitting on the subject of the grant of the certificate without an application on the part of the bankrupt, which had not been made in the present case.

Before *The*  
LORDS JUSTICES.

The Commissioners may appoint a sitting to consider the propriety of granting a bankrupt's certificate, without any application on the part of the bankrupt.

The bankrupt had carried on business at *Liverpool* as a wine-merchant. The adjudication took place on the 10th of *October* 1851. After the bankrupt had passed his last examination, the Commissioner appointed a public sitting for the allowance of the certificate. The bankrupt had made no application for such sitting, and  
on

1852.

*Ex parte*  
SHERLOCK.

on the contrary had protested against any being appointed, and he now stated by his petition and affidavit that he was not then nor now ready to enter into the question of his certificate.

Mr. *Swanston* and Mr. *Renshaw*, in support of the appeal.

Although the 198th section of the Bankrupt Law Consolidation Act 1849, does not say anything of application on the part of the bankrupt, it assumes that application to be made by him, for it requires notice be given to the solicitor of the assignees, and assignees and that creditors shall give to the Registrar three days notice of their intention to oppose, but nothing is said about notice being given to the bankrupt. As he is the person most interested in the proceeding, the inference is irresistible that the bankrupt was intended to be the applicant.

[*The LORD JUSTICE KNIGHT BRUCE*.—The 39th section of 5 & 6 *Vict.* c. 122, provided that it should be lawful if the Court authorized, to act in the prosecution of a fiat in bankruptcy already issued or thereafter to be issued, on the application of the bankrupt named in such fiat, to appoint a public sitting for the allowance of his certificate; it then continues in terms similar to those of the present enactment. Does not the omission of the words “on the application of the bankrupt,” in the present Act, seem to be designed?]

The provisions being *in pari materiâ*, must be taken not to differ in this respect, there being no express words indicating an intention so to alter the law. Justice to the bankrupt requires that he should be able to

**to** select his own time for the consideration of his certificate. It is no hardship to the creditors that it should **be** deferred, because by the bankrupt remaining without **his** certificate, all his property and he himself personally **remain** liable to their demands.

1852.  
*Ex parte*  
 SHERLOCK.

Mr. *Bacon* and Mr. *Speed*, for the assignees, were not called on.

*The* LORD JUSTICE KNIGHT BRUCE.

The opinion of both of us is,—that the true construction of the 198th section of the Bankrupt Law Consolidation Act, whether compared with the 39th section of the statute 5 & 6 of the Queen, chapter 122, or considered independently of that statute, does not require an application to be made on the part of the bankrupt in order to give the Commissioner jurisdiction.

*Ex parte* NICHOLAS'S Assignees ;

July 29.

In the Matter of JACOB JENKINS NICHOLAS,  
 a Bankrupt ;

In the Matter of the MONMOUTHSHIRE and  
 GLAMORGANSHIRE BANKING COMPANY ;

AND

In the Matter of THE JOINT-STOCK COMPANIES  
 WINDING-UP ACTS, 1848 & 1849.

**T**HIS was an appeal from the rejection by the Commissioner of a proof for the amount of a call made under the Joint-Stock Companies Winding-up Acts.

Before *The*  
 LORDS JUSTICES.

A shareholder in a joint-stock bank-

The

ing Company became bankrupt. Afterwards an order for the winding up the affairs of the banking Company was made. Subsequently the bankrupt obtained his certificate, and his name was afterwards included in the list of contributories. On a call being afterwards made, the official manager, by the Master's direction, applied to prove for the balance due from the bankrupt after debiting him with the call. *Held*, that the proof ought to have been admitted.

By the 14th section of the Joint Stock Companies Winding-up Amendment Act, 1849, it is enacted, "That if any contributory, or alleged contributory, be a bankrupt or insolvent, he shall be entitled to attend by his assignees, and in all proceedings against his estate, under the said Act, shall be sufficiently represented by such assignees."

1852.

*Ex parte*  
NICHOLAS.

By the 30th section it is enacted, "That where any contributory of the Company is a bankrupt or insolvent, it shall be lawful for the official manager to prove in the matter of such bankruptcy or insolvency for any balance ordered by the Master to be proved against the estate of such contributory, and to take and receive dividends in respect of such balance, in the matter of the bankruptcy or insolvency, as a separate debt due from such bankrupt or insolvent, and rateably with the other separate creditors: Provided always, that if any creditor of the Company, not being such petitioning creditor under the fiat, as after mentioned, shall have proved or shall prove against the estate of such bankrupt or insolvent contributory, in respect of any debt due from the Company, then the dividends received by the official manager from the estate of such bankrupt or insolvent contributory shall be paid and distributed by the official manager, under the direction of the Master, in the first instance rateably amongst the creditors of the Company so proving against the estate of such bankrupt or insolvent contributory as aforesaid, until the debts due to such creditors respectively be fully paid; and, subject thereto, such dividends shall be applied by the official manager towards the general purposes of the winding up of the affairs of the Company. Provided also, that in case any such fiat shall have been issued on the petition of a joint creditor of the said Company, in respect of his joint debt, and he shall have proved such joint debt for the

T 2

purpose

1852.

*Ex parte*  
NICHOLAS.

purpose of receiving dividends under such fiat, then any dividends paid to such petitioning creditor under such proof shall be set against the dividends payable to such official manager, in respect of the proof so made by him as aforesaid, so far as the same will extend."

Mr. *Bethell* and Mr. *W. M. James*, in support of the appeal.

This case is expressly provided for by the 30th section of the Amendment Act of 1849. The Commissioner proceeded upon the words "where any contributory of the Company is a bankrupt or insolvent," and held that the section only applied to bankruptcies which had taken place before the passing of the Act, and only to cases in which the bankrupt was on the list of contributories at the time of the bankruptcy. The whole scope of the Act, and the terms of the 14th and 30th sections however, show that the operation of the clause is not thus limited. The interpretation clause of the Act of 1848, shows that the word "contributory" is not confined to persons on the list. In *Chapple's case (a)*, Sir *James Parker* held that a call made upon a bankrupt was barred by his certificate previously obtained. It follows that it is a proveable debt against his estate.

*Ex parte Brown (b)* has already decided the question.

Mr. *Roundell Palmer* and Mr. *Karslake*, for the assignees of the bankrupt.

In *Chapple's case*, cited on the other side (a), Vice-Chancellor *Parker* held that a certificated bankrupt ought not to be placed upon the list of contributories, and that is the very proposition which we maintain here. There was no debt at the date of the bankruptcy in respect of this call, a circumstance which completely distinguishes

(a) 5 *De G. & S.* 400.

(b) 3 *De G. & S.* 590.

tinguishes the case from *Ex parte Brown* (a). The Amendment Act was merely designed to give a legislative sanction to the decision in *Ex parte Brown*, as is clear from the expression “when a contributory,” “is bankrupt.” That condition is only fulfilled by the liability as a contributory having been settled before the bankruptcy. Before any order is made there is no debt, and the Court will not impute to the Legislature the intention of disturbing, further than the express words of the Act require, those rules for the administration of a bankrupt’s estate, which justly exclude those, who are jointly liable with him, from proving against his estate in competition with their own creditors.

They cited *Davison v. Farmer* (b), and *Steward v. Greaves* (c).

*The LORD JUSTICE KNIGHT BRUCE.*

These applications, the one in the bankruptcy of Mr. *Jacob Jenkins Nicholas*, and the other under a winding-up order that applies to a joint-stock Company of which Mr. *Nicholas* was a shareholder, raise substantially this only question (I discard questions of form), whether, by the effect of the Acts of Parliament called the Joint-Stock Companies Winding-up Acts, the general separate creditors of a bankrupt who happens to hold shares in a joint-stock Company, which is made liable to the operation of these Acts, are placed in a different position from the general separate creditors of any other person engaged in a mercantile partnership. The question is, not whether there ought to be a difference, not whether there are grounds in theory or reason for making it, but whether the Legislature has or has not said that it shall be so in language not to be mistaken. Now the case stands

(a) 3 *De G. & S.* 590.

(b) 6 *Exch.* 242.

(c) 10 *M. & W.* 711.

1852.

*Ex parte*  
NICHOLAS.



1852.

*Ex parte*  
NICHOLAS.

stands thus :—Mr. *Nicholas* was unhappily a shareholder in one, I believe, of the most wretched of the joint-stock Companies which have failed. It stopped payment in the year 1851. At the time of the stoppage, Mr. *Nicholas* had not become a bankrupt, he became a bankrupt afterwards. After his bankruptcy, but before he obtained his certificate, a winding-up order was made and after the winding-up order his certificate was obtained; and it is now contended, on the part of the official manager of the Company, that a call made in respect of the shares which this bankrupt held before his bankruptcy, is to be treated for every purpose as a separate debt of the bankrupt in the administration of his estate,—a startling proposition, certainly, to any person who has not his attention called to the details of these Acts of Parliament. It is clear that, independently of these Acts of Parliament, according to all the ordinary law relating to bankruptcy, proof could not be made in competition with the separate creditors. It could not be made on behalf of the partners in the joint-stock Company, because all the debts are not paid; nor could it be made on behalf of a joint creditor, because there is joint estate, and probably there are solvent partners. If the general separate creditors are to suffer, it is on the ground of a particular law created by these Acts. The case seems, to my learned brother and to myself, to turn entirely upon the 14th and 30th sections of the Joint Stock Companies Winding-up Act of 1849. [His Lordship read them (a)].

It is difficult to surmount these words, but it has been contended that the Act does not apply to a case where bankruptcy has taken place before the winding-up order. Now the word “is” cannot be construed literally; it means “shall be,” or “may happen to be.” According to

(a) See *ante*, p. 273.

to the construction offered on the part of the assignees, the word ought to be rather "becomes." The particular verb used seems more favourable to the argument on behalf of the official manager than to the argument opposed to him. The bankruptcy did not release this gentleman from his liability. He was as liable at the moment of the winding-up order as ever, and so was his estate. He was liable in person, because he had no certificate. His estate was liable, because it was liable before the bankruptcy. There appears to be nothing unreasonable in that particular construction. The mode in which the dividends are to be paid is a different matter. The moment you surmount the difficulty presented by the use of the word "is," and hold that it applies to a bankrupt who has not obtained his certificate, the only difficulty is surmounted, because the other words are clear. The words are, that the official manager may prove for the balance due from the bankrupt to the Company as a separate debt due from such bankrupt or insolvent, and rateably with the other separate creditors.

1852.

*Ex parte*  
NICHOLAS.

We agree that this changes the law of the country as to particular individuals, for reasons which we do not comprehend. It is not, however, our business to inquire what the reasons were; our duty is to construe the Act. I fear that the rights of creditors have been changed by the Legislature, whether it was so intended or not. The latter clauses of the 30th section, as to the application of the dividends, are, perhaps, *locus communis*, and afford an argument each way; but the arguments in favour of the view taken by the official manager seem to preponderate. It is true that there are provisions which do not seem to me well or correctly adapted to any theory or any practice that ever prevailed in the country, as far as I understand the matter; but it would be very unsafe to rely on such provisions as contravening language which happens to be so clear as the words of this section that

1852.  
  
*Ex parte*  
NICHOLAS.

that I have read. I feel myself, therefore, obliged to say, with regret, that this demand has been directed by the law of the country to come in competition with the separate creditors, who are thus placed in a different position from any other separate creditors.

*The* LORD JUSTICE LORD CRANWORTH.

I concur in the conclusion of my learned brother, and with the same regret. If Mr. *Palmer* had satisfied me that, by construing the words "is bankrupt" as he suggests, the difficulty would be surmounted, he would have gone some way towards convincing me that the construction contended for by the assignees was the correct one. But whatever be the period of the bankruptcy relatively to that of the order to wind up the Company, the same difficulty and anomaly presents itself, viz. that the general body of separate creditors of a person who happens to be a contributory to a joint-stock Company, are placed on a different footing from that on which they would have stood if these Winding-up Acts had not been passed. It is difficult to suppose that the Legislature intended to affect or alter their rights, but it is our duty to confine our attention to the language of the Acts of Parliament, which cannot, I think, be interpreted so as not to lead to some anomaly.

---

1852.

In the Matter of WAUGH'S TRUST,

Jan. 14, 21.

AND

In the Matter of THE TRUSTEE ACT, 1850.

**MR. J. V. PRIOR** applied for an order under the Trustee Act 1850, vesting certain trust estates in a new trustee appointed in the place of a deceased trustee whose heir-at-law was of unsound mind, although not so found by inquisition.

Before *The*  
LORDS JUSTICES.

*Semble*, that the Lords Justices intrusted by warrant under the sign manual to make orders in Lunacy, have jurisdiction to make a vesting order under the Trustee Act, where the heir of the survivor's trustee is of unsound mind; but for greater certainty, the Lord Chancellor made the order.

*The* LORD JUSTICE LORD CRANWORTH.

The statute which constitutes this Court, 14 & 15 Vict. c. 83, enacts in sect. 13, that "nothing therein contained shall affect any of the powers, duties, or authorities of the Lord Chancellor, under and by virtue of any appointment under the sign manual of the Crown, as having the custody of the persons and estates of lunatics." It is true that we also are now exercising a jurisdiction in Lunacy by a warrant under the sign manual; but then the Trustee Act, 1850, like the former Act, 1 Will. IV. c. 60, only authorizes the Lord Chancellor, intrusted as therein mentioned, to do what is here asked. It seems to us that it would be safer to make the application to the Lord Chancellor, who strictly comes within the words of the statute. We do not mean to say that we have not the power, but we think the point one well worthy of consideration. Had the statute contained, after the words "Lord Chancellor," the words "or other person or persons intrusted as aforesaid," or some such words, the case would have been free from the difficulty.

*The* LORD JUSTICE KNIGHT BRUCE.

If that which my learned brother has suggested be  
the

1852.

*In re*  
WAUGH.

the true construction of the Act—and I must desire to be considered as dissenting from it—we should do no service to the Petitioner; for if we were to make order, and the property were subsequently offered for sale, some objection would probably be taken by conveyancers. The Crown appoints an officer or officers to exercise jurisdiction and perform certain functions in Lunacy. The warrant which gives to this Court jurisdiction directs that the Lord Chancellor or Lords Justices, or his Lordship and either of the Lords Justices, shall adjudicate in matters of this nature. The section of the statute which has been referred to, speaks certainly of the Lord Chancellor only. I have called your attention to this point; but if you like to hazard the difficulties which may hereafter arise when the property shall be dealt with, we may be disposed to make the order.

The matter was afterwards brought before the Lord Chancellor, who made the order, saying, that although this was the safer course, his Lordship considered that the Lords Justices had jurisdiction under the Act to deal with the case.

Jan. 28. In the Matter of NOBLE, a Person of unsound Mind.

Before The  
LORDS JUSTICES.

Where one of two committees of a lunatic's estate had died, and the property was very small, the Court, without

a fresh reference to the Master, ordered the income to be paid to the surviving committee on evidence of his solvency.

MR. OSBORNE supported a petition praying that the income of a lunatic might be paid to the surviving committee of the estate, to be applied by him for the benefit of the lunatic, whose income was liable for more than 100*l.* per annum, which had been reported by the Master to be not more than sufficient for support.

Mr. *Cottrell*, for the next of kin, consented.

The LORD JUSTICE LORD CRANWORTH inquired whether there was any affidavit as to the solvency of the surviving committee, and observed that two persons might be properly appointed committees, without it necessarily following that one of them alone would be properly intrusted.

Mr. *Osborne* said that an affidavit would be made as to the solvency.

Their LORDSHIPS ordered, that on the production of such an affidavit the order should be made.

1852.

*In re*  
NOBLE.

---

TURNBULL *v.* WARNE.

*April 19.*

THIS was a motion on behalf of a Defendant to a claim, for leave to sue out a writ of summons under the 18th Order of *April* 1850, for the purpose of bringing before the Court, as Defendants to the claim, certain persons who had been certified by the Master to be necessary parties to the suit. By the order made on the hearing of the claim, the Master was to proceed on being satisfied that all necessary parties had been served with writs of summons. The Plaintiff had not taken any steps under the order. The application was originally made to Vice-Chancellor *Turner*, who doubted whether he could make the order, the 18th Order only giving to a Plaintiff the power of suing out the writ.

Mr. *W. D. Lewis* supported the application.

Their LORDSHIPS considered that the word "Plaintiff," in the 18th Order, might mean the party prosecuting the decree, but that at all events the Court had general authority to make such an order as was sought: and the order was made accordingly.

Before *The*  
LORDS JUSTICES.

Where the Plaintiff omitted to prosecute an order upon a claim, *Held*, that the Court might give a Defendant leave to sue out writs of summons to bring before the Master the parties required by the terms of the order.

1852.

March 30, 31.  
April 7, 15,  
17.

Before *The*  
LORDS JUSTICES.

Where a patent had been in force for twelve years, and had been the subject of four suits against different persons, all of which terminated favourably to the patentee, and in two of which verdicts had been given in favour of the validity of the patent, *Held* that, in a fifth case, the patentee was entitled to an injunction pending the trial of the legal right, although a fresh fact was brought forward, tending to impeach the novelty of the invention. A patentee does not acquiesce in infringement of his patent by omitting to proceed by *scire facias* to set aside a subsequent patent extending to part of his invention, unless such subsequent patent is put in practice.

An allegation as to the Defendant's inability to be answerable in damages was *held* not irrelevant upon a motion for an injunction against the infringement of a patent.

## NEWALL v. WILSON.

**T**HIS was an appeal from the refusal by the Master of the Rolls, of a motion for an injunction to restrain the infringement of a patent.

The letters patent were dated the 7th of *August* 1840, and were for the sale and use, for fourteen years, of certain improvements in wire ropes, (whereby the individual wires were prevented from being twisted in themselves) and in the machinery for making such ropes.

The specification had been duly inrolled.

The bill and the affidavits in support of the same stated, among other things, the particulars of the suits against other persons, in which the validity of the patent had been in dispute.

One of these was a suit instituted in 1841 against the Defendant named *Andrew Smith*, who thereupon was enjoined from infringing the patent.

Another suit was instituted in 1844 by the Plaintiff against certain persons carrying on business as wire manufacturers at *Sunderland*, under the style of

*land, Webster, & Son.* In this suit a motion for an injunction had been ordered to stand over, for an action to be brought to try the validity of the patent. The action had been brought; the jury had found a verdict for the Plaintiff on all the issues, the judge having certified that the validity of the patent had come in question on the trial. Messrs. *Rowland, Webster, & Son* obtained a rule to show cause why a new trial should not be directed, but afterwards submitted to the verdict, and took a licence from the Plaintiff. They had paid since large sums by way of royalty.

1852.  
NEWALL  
v.  
WILSON.


Another of the suits was instituted by the Plaintiff in December 1850, against certain Defendants named *Wilkins & Weatherly*, in which the same course had been taken on a motion for an injunction, and in which an injunction had been actually granted after trial at law, and was still in force.

A fourth suit was instituted in 1851 by the Plaintiff against a Defendant named *Edward Weatherly*, who had succeeded Messrs. *Wilkins & Weatherly* in their business. In this suit an injunction was at once granted on an *ex parte* application, and no application had been made to dissolve it.

The present bill, and the Plaintiff's affidavit in support of the motion, stated instances of infringement by the Defendant, and that the Defendant was not a person of any capital or property, from whom the Plaintiff could recover damages.

The affidavits in opposition to the motion contained statements impeaching the novelty of the manufacture. They stated that in 1832 a similar manufacture had been in use in *Haydock Colliery*. A number of a periodical publication called *The Mining Review*, published



1852.  
  
 NEWALL  
 v.  
 WILSON.

lished in 1837, was also produced, in which an account was given of a mode of making wire ropes, invented by a Mr. *Albert*, and practised in the *Hartz Mountains*, which, it was contended, was the same as that which the Plaintiff had attempted to protect by the patent in question. It was stated that this publication had not been adverted to in the former suits. Other statements in the affidavit were made to show that the Plaintiff's enjoyment of the patent had not been exclusive.

Mr. *Bethell*, Mr. *Roupell*, and Mr. *Cairns*, for the Plaintiff, the Appellant.

After an enjoyment of twelve years, and the establishment of the validity of the patent in three distinct suits, the Plaintiff is, according to the ordinary practice of the Court, at all events entitled to an injunction pending any proceeding at law which the Court may think fit to prescribe, if in such circumstances it should indeed prescribe any. Much less strong *primâ facie* evidence has been held sufficient to entitle a Plaintiff to an injunction, the principle being, that when the public has thus acquiesced in the validity of a patent, the patentee ought to be protected until his title is successfully disputed.

They cited *Harmer v. Plane* (a), *Hill v. Thompson* (b), *Stevens v. Keating* (c).

Sir *Alexander Cockburn* and Mr. *Selwyn*, for the Defendant.

The circumstance of the publication in the *Mining Review*, not having been before the Court in the former proceedings, prevents their affecting the present motion.

Moreover,

(a) 14 *Ves.* 130.

(b) 3 *Mer.* 622.

(c) 2 *Ph.* 333; and see *Brid-*

*son v. Beneike*, 12 *Beav.* 3;

*Caldwell v. Vanolissingen*, 9

*Hare*, 423.

Moreover, the letters patent are misstated upon the bill; for on referring to an office copy of them, it appears that the Plaintiff represented to the Crown that the invention was partly communicated to him by a foreigner residing abroad; whereas the bill and the Plaintiff's affidavit states that he was himself the true and first inventor, and that he so represented himself in his petition to the Crown. Such a misrepresentation is in itself sufficient to prevent him from obtaining an injunction. And when challenged by our affidavits to state the name and residence of the foreigner, the Plaintiff does neither, leaving the Court, therefore, to infer that the representation to the Crown was untrue, and that the invention was not communicated to any extent by a foreigner resident abroad.

1852.  
NEWALL  
v.  
WILSON.

They cited *Perry v. Truefitt* (a), *Pidding v. How* (b), *Minter v. Wells* (c), and *Collard v. Allison* (d).

During the argument for the Defendant, a proposal was made on behalf of the Plaintiff to forego the injunction on the Defendant giving security for damages. The case stood over for the security to be arranged, and the argument was afterwards resumed, the security not having been agreed upon.

The LORD JUSTICE KNIGHT BRUCE.

April 17.

The first question upon this motion is, whether the letters patent, on which the Plaintiff grounds his case, have been shown to be bad in law. In my opinion they have not. The utmost extent to which the Defendant has succeeded on the question that he has raised, as to the validity of the patent, is to show that doubt may be

(a) 6 Beav. 66.

(b) 8 Sim. 477.

(c) Webst. 127.

(d) 4 Myl. & Cr. 487.

1852.  
 NEWALL  
 v.  
 WILSON.

be entertained upon it. The patent is of long standing ; as a contract with society at large, it has been allowed to exist for several years.

Has there been enjoyment under it? Beyond all question there has been, during several years. While the patent has existed, the Plaintiff's exclusive right has been actively asserted, and has in several instances been submitted to. He has succeeded upon the question of validity, at least once, if not more than once, at law, in circumstances as to which it is impossible that collusion can be alleged. And if during the whole time for which the patent has subsisted in point of fact, the enjoyment and possession cannot be deemed to have been perfectly exclusive in every sense, there has been, I think, considering the various proceedings which have taken place, and the conduct of the Plaintiff throughout, as well as the conduct of various individuals of whom complaint has been made with reference to the subject of the patent, a sufficiency of enjoyment to bring the case within the principle enunciated by Lord Eldon in the well-known cases of *Harmer v. Plane* (a), and *Hill v. Thompson* (b).

On a former occasion the argument was broken off under these circumstances. There had been an imputation cast by the Plaintiff's evidence, on the Defendant's means to answer any pecuniary demand to a considerable extent which might be made upon him. Such questions are always disagreeable, and often irrelevant. I cannot, however, consider that upon a question whether an injunction shall issue against the continued invasion of a patent of disputed validity, where the Court has to consider the balance of inconvenience, the state of the circumstances of the Defendant is altogether without relevance.

I agree

(a) 14 Ves. 130.

(b) 3 Mer. 622.

I agree that it ought not to be lightly touched upon, or without very good reason made the subject of discussion. Now, that circumstance and others seem to have led, during the argument of the Defendant's counsel, to a proposal on the part of the Plaintiff's counsel, that if security should be given for making good such sums as might ultimately in the cause be awarded to the Plaintiff if successful, the Plaintiff would consent to the injunction not going, care being taken to procure a speedy trial of the question at law. The offer was accepted, and it was distinctly agreed in Court that security without limit should be given; not security upon property, but the suretyship of certain substantial persons who would be willing to undertake that the Defendant should pay what (if any) sum he might in the result be held liable to pay in the suit. The matter there stood. Now it appears, either through inability to obtain that suretyship, as to obtaining which the Defendant by his agent expressed confidence on the former occasion, or for some other reason, that suretyship is not now to be given. I do not altogether found myself on this circumstance. I think it, however, one in such a case as the present not to be disregarded.

Upon the whole I am of opinion, speaking for myself alone, (and I have no reason to believe that Lord *Cranworth* differs from me,) that upon the plaintiff undertaking to abide by any order respecting damages, which the Court shall make in the event of the injunction being dissolved or varied, the injunction should go substantially, in the language of the notice of motion, which I suppose is in the language of the bill, without prejudice, however, to any question; the order providing for a speedy trial, as to which we shall of course listen to any suggestion of counsel on either side.

1852.  
NEWALL  
v.  
WILSON.

1852.  
 NEWALL  
 v.  
 WILSON.

*The* LORD JUSTICE LORD CRANWORTH.

I entirely take the same view of this case as my learned brother.

It is always rather a delicate and somewhat difficult duty that the Court has to discharge, in granting or withholding an injunction in cases like the present. By granting it, it is true, risk is run (as Mr. *Selwyn* has pointed out) of doing considerable damage, for which compensation is not perhaps always capable of being secured, even the undertaking which is given by the Plaintiff, the Defendant's works being stopped for a longer or shorter period of time. But on the other hand, by withholding the injunction, injury to an indefinite extent may be occasioned to the Plaintiff.

What is then to be the rule which is to guide the discretion of the Court in such cases? I have always understood that the principle as laid down by Lord *Eldon* in that case of *Hill v. Thompson* (a), is that upon which the Court has thought it most safe to act; for sometimes, not acting is doing as much injustice as acting, and what Lord *Eldon* there laid down is this: that where a patent has been granted, and there has been an exclusive possession of some duration under it, the Court will not interpose by injunction without putting the party previously to establish the validity of his patent by an action at law. But where the patent is but of yesterday, and upon an application being made for an injunction, it is endeavoured to be shown, in opposition to it, that there is no good specification, or otherwise that the patent ought not to have been granted, the Court will not from its own notions respecting the matter in dispute act upon the presumed validity or invalidity of the patent, without the right having been ascertained by a previous trial.

(a) 3 *McCr.* 622.

**but** will send the patentee to law and oblige him to **establish** the validity of his patent in a court of law, **before** it will grant him the benefit of an injunction.

1852.  
NEWALL  
v.  
WILSON.

Now I have rarely seen a case in which there was so **much** to satisfy the Court (speaking for myself) of **exclusive** enjoyment, as there is here. The patent was **dated** in 1840; it seems to have been infringed (or, at **least**, the patentee thought it was infringed) in the following year; for in the month of *August* 1841, a bill was **filed** to restrain a person of the name of *Smith* from **violating** the patent. The suit did not proceed further, **because** *Smith* acceded to it. That, therefore, was not so **strong** a case as if it had proceeded to adjudication; but **as** far as the Plaintiff was concerned, he had done **every-thing** in his power to protect his right or alleged right. He proceeded against the person who appeared to have **infringed** the patent, and that person acquiesced in the **justice** of the proceeding. Then again, three years afterwards, in *February* 1844, another bill was filed against *Rowland, Webster, & Son*. No injunction was there **granted**. I suppose the Court did not think there was **sufficient** evidence of exclusive enjoyment, but it directed **an** action to be brought, which was accordingly tried in *June* of that year, and the Plaintiff succeeded. The **pro-ceeding** stopped there; why? Because the Defendant **then** acquiesced and took a licence. Thus matters, it **seems**, went on until the year 1850, in the latter part of **which** year another bill was filed against *Wilkins & Weatherly*, and an action was brought against these **two** Defendants, the Court declining to interfere until **the** action was tried. The action was tried, and in that **action** the Plaintiff obtained a judgment, and the **in-junction** was granted. Then again, in *August* of the following year another attempt was made. A bill was **filed** against a person of the name of *Weatherly*, and an **injunction** granted *ex parte*.

1852.  
 NEWALL  
 v.  
 WILSON.

Now if that is not to be evidence of exclusive enjoyment, it is very difficult to say what is to be evidence upon such a subject, because it is clear that the Plaintiff claimed exclusive enjoyment, and proceeded against parties who interfered with that enjoyment, and that those proceedings were always practically successful, and in one instance at least, successful by being carried to the utmost extent.

This seems to me to make out the case of exclusive enjoyment, and the attempts that have been made to show that there was not an exclusive enjoyment, in my mind wholly fail. Mr. Selwyn put it thus: that in 185 the present Defendant obtained a patent for an invention inconsistent with the notion of the validity of the Plaintiff's patent. Now in the first place, upon looking at the Defendant's specification, I cannot say that it is, in necessity at least, at variance with the Plaintiff's patent but I should be very slow to hold that a party was bound to proceed by *scire facias*, or that it is to be held that he has not had the exclusive enjoyment of his own patent, because he does not proceed by *scire facias* to repeal other letters patent, if the other patentees do not act upon the latter. A good deal of evidence was given with the view of inducing the Court to understand that Mr. Wilson had been proceeding to manufacture ropes in a manner inconsistent with the validity of the Plaintiff's patent. I think the evidence upon that subject fails. It may be, and I suspect it is, true that he had been doing so, but on the other hand it is clear that the Plaintiff was setting every machine in motion to obtain positive evidence of infringement, the result being, that he could not make out that Mr. Wilson had been violating his patent except in the instance now brought forward. The moment he ascertained that, he instituted these proceedings.

There having been a very long enjoyment of the patent, I think this Court is bound to take that, as such  
*primi*

*prima facie* evidence of the Plaintiff's right, as to protect him by an interlocutory injunction. I do not in saying **this**, mean to give the least opinion as to whether or not upon the trial the patent may turn out to be good or not. Sir *Alexander Cockburn* pointed out a great number of reasons for supposing, that when the matter is more sifted than it was upon the former trial or trials, it will turn out not to be a valid patent. Be it so; still I think when a party has, by the means which have been taken by the present Plaintiff, done everything to clothe himself *prima facie* with a right to a valid patent, the Court is bound to take this interlocutory mode of proceeding. The Plaintiff in such a case is the party to be presumed to be in the right, until it is shown he has been enjoying something that he was not entitled to.

1852.  
NEWALL  
v.  
WILSON.

---

SIMS v. HELLING.

April 26.

**T**HIS was an appeal of a Defendant from the whole of an order made upon a claim.

Before *The*  
LORDS JUSTICES.

Mr. *Bethell* and Mr. *Tripp*, for the Appellant, claimed the right to begin, relying on the 29th Order of April 1850, which directs that an order upon a claim may be varied upon motion. They contended that the practice upon appeal motions must be followed.

On an appeal from the whole of an order made upon a claim, the Plaintiff has the right to begin.

Mr. *Roundell Palmer* and Mr. *Sandys*, for the Plaintiff, adverted to the 14th Order, which places an order made upon a claim upon the same footing as a decree.

Their LORDSHIPS held, that the practice ought to follow as nearly as possible that adopted in suits commenced by bill, and that the Plaintiff had the right to begin.



1852.

April 29.

COOPE v. CARTER.

COOPE v. TOWNSEND.

Before *The*  
LORDS JUSTICES.

A bill was filed by *cestuis que trust-*  
*ent* to administer the trusts of a settled fund, and seeking to charge the estate of a deceased trustee with sums which he might have received but for his wilful default. At the hearing, the ordinary accounts were only directed, and no inquiry was directed or reservation made with reference to wilful default.

In the course of the inquiries in the Master's office some documents were in evi-

dence, which were relied upon by the Plaintiffs, as leading to an inference that the trustee might have received more than was admitted to have been actually invested on account of the trust fund. *Held*, that it was not proper, on further directions, to direct an inquiry as to wilful default.

THIS was an appeal from a decree of Vice-Chancellor *Wigram* (made upon the hearing of the above causes on further directions), so far as that decree directed an inquiry before the Master as to any sums which might have been received by the Appellant's testator, Dr. *Townsend*, but for his wilful default as trustee of a settlement dated the 13th of *May* 1815, made in contemplation of the marriage of Mr. *Edmund Cresswell* with Miss *Frances Wallbanke*.

The property comprised in the settlement consisted principally of the share of Miss *Wallbanke* (the intended wife), under the will of her father, of which a Mr. *Pitt* and Dr. *Townsend* were the executors. Dr. *Townsend* was (as has been already mentioned) also a trustee of the settlement, and with him was associated, as co-trustee of the settlement, Mr. *Richard Carter*, but neither of them had executed the deed.

Dr. *Townsend* died in 1830, leaving *Richard Carter* surviving.

In *January* 1843, the original bill in the first of the above-mentioned causes was filed on behalf of the children of *Edmund Cresswell* (then deceased), against *Richard*

*Richard Carter*, the surviving trustee, and against the Appellants, as executors of *Dr. Townsend*.

1852.

COOPE

v.

CARTER.

It prayed that the amount and particulars of the fortune of *Frances Cresswell*, assigned by the indenture of settlement of the 13th of *May* 1815, received by *Dr. Townsend* deceased and *Richard Carter*, or either of them, or of any other person or persons by their or either of their order, or for their or either of their use, or which, but for their or either of their wilful neglect or default might have been received, might be ascertained; and that it might be declared that *Richard Carter* personally, and the Defendants, the executors of *Dr. Townsend* deceased, to the extent of the assets received by them as such executors, were severally and respectively liable and might be decreed to pay to the Plaintiffs, *Joseph Richard Coope* and *Henry Maddocks Daniel*, as the then present trustees of the indenture of settlement of the 13th of *May* 1815, the amount of the fortune of *Frances Cresswell* so to be ascertained, with interest at 5*l.* per cent. per annum, such interest to be computed as and from the 29th of *August* 1842; and that the Defendants might also be decreed to pay to the Plaintiffs the costs of the suit.

The Plaintiffs had obtained an order, under which 500*l.*, 3*l.* 5*s.* per cent. Annuities, had been transferred into Court by *Dr. Townsend's* executors.

The Defendant *Richard Carter* died before the hearing, and the suit was revived against his executor.

The causes came on to be heard on the 20th of *January* 1846, when, there being no evidence that Mr. *Richard Carter* had received any part of the settled property, or acted in the trusts, a decree was made dismissing the bill

1852.

COOPER  
v.  
CARTER.

bill as against his executor, and it was referred to the Master to inquire and state to the Court the amount and particulars of the fortune of *Frances Cresswell*, assigned by the indenture of settlement of the 13th of *May* 1815, which had been received by Dr. *Townsend* deceased, or by any other person or persons by his order or for his use. And the Master was to be at liberty to state the circumstances specially with regard to the matters aforesaid, as he should think fit.

In the course of the inquiries before the Master some letters were in evidence, which related to the amount received by two of Mrs. *Cresswell's* sisters under the father's will, and on these the Plaintiffs relied as showing that Dr. *Townsend*, as executor of Mrs. *Wallbank* might have received more than the sum invested by him in respect of Mrs. *Cresswell's* share of her father's property. The Plaintiffs thereupon carried in a state of facts for the purpose of having inserted in the report statement relating to these matters by way of special circumstances. The Master, however, disallowed the state of facts, as not relating to the matters referred to him by the decree, and by his report found that the amount and particulars of Mrs. *Cresswell's* fortune received by Dr. *Townsend*, or by any other person by his order or for his use, consisted only of the sum which had been invested by him.

The Plaintiffs excepted to this report, and on the hearing on further directions, on the 16th of *February* 1854 the Vice-Chancellor amongst other things referred back to the Master to inquire and state to the Court the amount and particulars of which the fortune of *Frances Cresswell*, assigned by an indenture of settlement of the 13th of *May* 1815, consisted. And in case the said Master

**M**aster should find that the said fortune consisted of any **other** particulars than the 500*l.*, 8*l.* 5*s.* per cent. **Annui-**  
**ties**, in his report dated the 7th of *May* 1849 men-  
**tioned**, then it was ordered that the said Master should  
**inquire** and state to the Court whether *Dr. Townsend*  
**could** with due diligence, and without wilful neglect  
**or** default, have received any and what part of such  
**particulars**. And the Master was to be at liberty to state  
**any** circumstances specially, and further directions and  
**costs** were reserved.

1852.

COOPER  
v.  
CARTER.

**F**rom this order *Dr. Townsend's* executors ap-  
**pealed**.

**Mr. Kenyon Parker** and **Mr. T. H. Hall**, for the  
**Appellants**.

It is contrary to the course of the Court to direct an  
**inquiry** as to wilful default upon further directions, where  
**the** common accounts only have been directed by the  
**original** decree. *Green v. Badley (a)* and *Garland v. Lit-*  
*tlewood (b)* are conclusive authorities on this point. That  
part of the case which relates to wilful default must be  
considered as having been disposed of by the original  
decree. The Plaintiffs never appealed from that decree.  
Indeed it was one more favourable to them than they  
were entitled to, and probably would not have been ob-  
tained had opposition been made to it; for a Plaintiff  
having sought to charge a surviving trustee, and the  
executors of a deceased trustee, and having alleged a case  
of joint liability, is not entitled to change the nature of  
his case at the hearing, and seek relief separately against  
the estate of the deceased trustee alone. Still less can  
he when he has obtained a decree without opposition in  
a particular

(a) 7 *Beav.* 274.

(b) 1 *Beav.* 527.

1852.

COOPER  
v.  
CARTER.

a particular form, have a decree of a different kind on further directions. These observations are only made to save the delay and expense of further litigation in this unjustifiably protracted suit; for all the circumstances on which the Plaintiffs rely as a ground for the inquiry objected to, might be explained, and would be shown to have really nothing to do with the question.

Mr. *Bethell* and Mr. *Daniel*, for the Plaintiffs.

The letters which are in evidence, and the testimony of one of the witnesses, show that some of the children of the testator received more than the sum which was invested by Dr. *Townsend* as Mrs. *Cresswell's* share, and this is a sufficient ground for inquiry whether more might not with proper diligence have been received in respect of that share. It would be most inconvenient to lay down or affirm such a rule, as that an inquiry as to wilful default shall in no case be directed for the first time on further directions. In many cases the whole foundation for such an inquiry must necessarily be the result of the investigation under the original decree. It is a fallacy to say that this part of the case was disposed of at the original hearing. If the Court meant to preclude itself from giving this part of the relief sought, it would have dismissed so much of the bill as sought for it.

*The* LORD JUSTICE KNIGHT BRUCE.

This suit relates to the case of a trustee, who died in the summer of the year 1830, but was not instituted until the month of *January* 1843. As the bill was framed it did not state this deceased gentleman (Dr. *Townsend*) to have been the sole trustee, or sole acting trustee. It represented him and Mr. *R. Carter* to have been, and to have acted as, trustees jointly. The error in that statement would have been of little importance had

**Dr. Townsend** been alive, as he knew the facts; but his **personal** representatives cannot be supposed to have **known** the circumstances equally well, if at all. They **were** brought before the Court in a state treating the **acts** complained of as the acts equally of Mr. *R. Carter* and the deceased Dr. *Townsend*. At the hearing they **find** that Dr. *Townsend* is alone to be made the object of **attack**, Mr. *R. Carter*, or his estate (which is the same **thing**), being dismissed, on the ground (it is to be **supposed**) that Mr. *R. Carter* had never accepted the **trusts**.

1852.  
 COOPER  
 v.  
 CARTER.

I am not quite sure, that, as Dr. *Townsend* had died **before** the suit was instituted, the circumstance to which **I** have just referred, namely, the dismissal of Mr. *R. Carter's* representative, is not of itself sufficient to support **the** present appeal. But I would rather not decide the **case** upon that ground.

When the case came on at the original hearing, an **account** was directed, of which no complaint was made. **The** account was taken; everything was duly accounted **for**; no complaint was made against Dr. *Townsend* or his representatives, but certain facts and documents were brought forward in the Master's office; and in consequence of these facts and documents, the Court, upon further directions, directed the inquiry now complained of. Whether the inquiry as to wilful default ought to have been directed, is the point now before us.

To go back to the original hearing, Lord *Eldon* often said, that, as a general rule, in order to obtain an inquiry as to wilful default against an executor or a trustee, you must allege a case for such an inquiry,  
 —must

1852.  
 COOPER  
 v.  
 CARTER.

—must pray for it, and prove one act at least of wilful default, and that, doing so, you may have a general decree as to wilful default. That is the course of the Court. This state of circumstances may, however, arise: namely, : case of wilful default may be alleged, and a prayer may be founded on it; but the circumstances appearing by admission or proof may only raise a case of suspicion in the mind of the Court, on the question whether an act of wilful default has been committed. In such a case I can conceive that the Court, if it is likely that further evidence may be obtained, ought to direct an inquiry short of directing wilful default, in order to ground up that a new order, and to direct an inquiry as to wilful default at a future stage. But then the inquiry should be directed in such a way as to call the Defendant's attention to the facts to be investigated.

For instance, if the allegation be that a sum of 1000 has been lost by wilful default, the inquiry may well be under what circumstances it was lost, and into the facts bearing on the loss. Then the evidence will be supplied and when it comes back to the Court, an inquiry as to wilful default may be directed. I can conceive the propriety, or even the necessity, of such a course; but it is not the habit of the Court to treat with severity a trustee who, although he has acted erroneously, has acted in good faith. That, however, was not the case here; the course taken here was tantamount to an adjudication (it not appearing that there was any wilful default) that there was no wilful default to be inquired into, because the account was only a general account of the receipts of the trustee. It is said that there was a direction to report circumstances specially; but Sir *William Horne*, a Master of great learning and experience, said,—and aid

**said** most truly,—that, with regard to special circumstances, they must be stated with respect to the “**matters aforesaid,**” that is to say, the question of receipts and allowances. Other questions were not before him, and **the** danger of an indictment for perjury in the event of **false** evidence being given upon such questions would **not** arise, because the evidence would not be material, **as** not addressed to matters in issue. It is said that the **evidence** was documentary here, but the rule is the **same**; nor were the Defendants called upon to address **themselves** to the evidence before the Master, because **the** Master was not to inquire as to wilful default. This **decree** was so worded as not to enable the Court on **further** directions to look, for any purpose of wilful default, **at** the new evidence produced before the Master, **inasmuch** as it was not evidence for any such purpose.

1852.  
 COOPER  
 v.  
 CARTER.

The consequence is, that without denying that a case **may** exist in which, on further directions, an inquiry **whether** wilful default has been committed may be directed, **I** do not think this such a case, and in my judgment, the **inquiry** had better be erased from the decree.

But assuming, that, according to the ordinary practice of the Court, there is nothing to prevent an inquiry being directed, it still remains to consider whether there was matter enough on the facts and documents stated in the report, to render this inquiry before the Master probably useful. I am of opinion, that, at the utmost, they raised a doubt as to an obscure matter, upon which all the persons who could have given important information have passed to their graves, leaving us only the means of conjecture. There would be great hazard of a miscarriage of justice, if this matter should be gone into. I am of opinion, I repeat, that the inquiry had better be struck out.

*The*



1852.

*The* LORD JUSTICE LORD CRANWORTH.

COOPE  
v.  
CARTER.

Assuming that the state of the pleadings and the tice of the Court warranted this inquiry, I think the facts of this case lead irresistibly to the inference the accounts were properly taken, and a proper dis- tion made of the testator's estate; that Dr. *Tou* had transferred into his name the whole of the fc of *Frances Cresswell* assigned by her marriage settle- namely, the fund then consisting of 500*l.*, 4*l.* per Annuities; and that therefore there was no g shown for an inquiry as to wilful default.

April 29.  
May 5, 8.

HART v. TULK.

HART v. GORDON.

TULK v. HART.

HART v. COTTRELL.

Before *The*  
LORDS JUS-  
TICES.

The words,  
"The said  
fourth sche-  
dule," in a  
will, *held* to  
mean "the  
said fifth

THIS was an appeal from the decision of Vice- cellor *Parker*, upon the construction of the *Charles Augustus Tulk*, the testator in the cause, the 23rd of *September* 1848.

The following circumstances relating to the st  
schedule," upon a consideration of all the provisions of the will and state of the testator's property and family when the will was made, al the actual words involved no contradiction nor repugnancy to the other sions of the will, except by making in one instance insufficient provision charges thereby created, having regard to the value of the property, : cept by making capricious and improbable dispositions, at variance wit appeared to be the general intention.

**the** family, and of the property of the testator at the **date** of his will, were in substance found by the Master's **report** in the cause.

1852.

HART

v.

TULK.

At the times of making his will and of his death, he had (**besides** a son whom he considered sufficiently provided **for**) seven children; viz. *Augustus Henry Tulk, Edward Hart Tulk, John Augustus Tulk, James Stuart Tulk, Caroline Augusta Gordon, Louisa Susanna Ley, and Sophia Augusta Cottrell.*

He had freehold houses in and near to *Leicester-square*, which by his will he divided into seven parcels, **and** described in seven schedules. These seven parcels **at** the date of the will produced the following annual **rentals**:—the first, 60*l.*; the second, 61*5l.*; the third, 60*3l.* 18*s.*; the fourth, 18*1l.*; the fifth, 133*l.* 10*s.*; the **sixth**, 60*5l.*; the seventh, 599*l.* 16*s.* A large house **which** had occupied a portion of the fourth parcel had **been** pulled down at the date of the will, and the site was **unlet** and unbuilt upon, and was entered at the annual value of 420*l.*

Settlements had been made upon the marriages of the three daughters. The settlement on Mrs. *Gordon's* marriage was made by indentures of lease and release, dated the 13th and 14th days of *July* 1834, whereby the testator conveyed to trustees certain houses in and near *Leicester-square*, to the use of the husband for life, and after his **decease** to the use of *Carolina Augusta Tulk* and her assigns during her life, and after her decease to the use and for the benefit of the children of the marriage, or of the **issue** of such children; in default of issue, as the husband and wife, or the survivor, should appoint. The property thus settled was of the yearly value of 461*l.* 5*s.*

The settlement made upon Mrs. *Ley's* marriage was  
an

1852.

HART  
v.  
TULK.

an assignment of a bond dated the 6th of *August* 1844, entered into by the testator with the trustees, in the sum of 3000*l.*, with a condition securing the payment of an annuity of 150*l.*, which, by an indenture dated the 6th of *August* 1844, was settled upon certain trusts for the benefit of Mr. and Mrs. *Ley* and their children. After the execution of the bond and indenture and the marriage, the testator agreed to increase the annuity to the annual sum of 200*l.*

Mrs. *Cottrell's* settlement was made by an indenture dated the 25th of *September* 1847, whereby the testator covenanted to pay to the trustees or trustee for the time being of the indenture the annual sum of 200*l.* upon trusts for Mrs. *Cottrell* and her children, with a proviso that if the testator should thereafter by deed or will, or otherwise, make any other provision for the parties beneficially interested in the indenture, equal to or of greater amount than the annual sum of 200*l.* thereby covenanted to be paid, the covenant on the part of *Charles A. Tulk* thereinbefore contained should cease.

For some time prior to and down to the time of the death of the testator, he allowed to his sons *Augustus Henry Tulk*, *Edward Hart Tulk*, and *James Stuart Tulk*, an annual sum of 200*l.* each, payable by quarterly instalments, for their maintenance and support, but made no allowance to his son *John Augustus Tulk*.

*James Stuart Tulk* had not at the time that the testator made his will, nor at the time of his death, any other income or means of support other than the allowance made to him by the testator.

The will, so far as is material, was as follows:—After directing

1852.

HART

v.

TULK.

directing payment out of the personal estate, of the testator's debts (except debts owing from him on mortgage), and his funeral and testamentary expenses, he directed the residue to be invested in the funds, so that the same might be added to and form part, and accumulate, and be held upon the same trusts as were thereinafter declared concerning the fund directed to be formed out of the rents of the hereditaments next thereinafter devised, for payment of the debts due from the testator on mortgage. The will then proceeded as follows : —“ Provided always, and I do hereby direct, that in case, at the time of my decease, a piece of ground situate on the east side of *Leicester-square* in the county of *Middlesex*, and now unoccupied, being part of the hereditaments hereinafter devised in trust for my son *James Stuart*, his heirs and assigns, and comprised in the fourth schedule hereinafter contained, shall not be let, the trustees or trustee for the time being of my said personal estate, shall from time to time, out of my said personal estate, first applying the annual income so far as the same may be sufficient, and then a sufficient part of the capital, pay unto my said son *James Stuart*, his heirs and assigns, the clear annual sum of 250*l.*, by equal half-yearly payments, until such piece of ground shall be let, or all the said mortgage debts shall be paid ; the first half-yearly payment to be made at the end of six calendar months next after my decease. And I devise all the messuages or tenements, and other hereditaments respectively comprised in the seven several schedules hereinafter contained, with the appurtenances, unto and to the use of the said *George Appleyard* and *James Meredith*, their heirs and assigns for ever, upon the trusts following ; that is to say, upon trust, that they my said trustees and the survivor of them, his heirs or assigns, shall in the first place from time to time, with and out of the rents and profits of the same messuages and

Vol. II. X D. M. G. tenements,

1852.

HART  
v.  
TULK.

tenements and other hereditaments, yearly and every year, until a fund sufficient to pay off all the mortgage debts charged on the same estates or any of them shall be raised under the trusts of this my will, raise the clear annual sum of 1600*l.* by equal half-yearly payments in every year, the first half-yearly payment to be raised at the end of six calendar months next after my decease. And I direct that the whole of the rents of all the hereditaments comprised in the fifth schedule hereinafter contained, shall be applicable, so far as the same are sufficient to the raising the said annual sum of 1600*l.*, and also, that until the said piece of ground in the said fourth schedule shall be let as aforesaid, the whole of the rents of all the other hereditaments comprised in that schedule shall be applicable in like manner, so far as the same are sufficient, and that the rents of the hereditaments respectively comprised in the five other schedules hereinafter contained, shall bear each an equal fifth part of raising the residue of the said annual sum of 1600*l.*, after raising so much thereof as the rents of the said hereditaments comprised in the said fifth schedule, and the rents of the said hereditaments comprised in the said fourth schedule, shall (until such piece of ground shall be let) be sufficient to pay. *But after such piece of ground shall be let, then I direct that the whole of the rents of all the hereditaments in the said fourth schedule shall be applicable, so far as the same may be sufficient to the raising the said annual sum of 1600*l.*, and the remainder of such annual sum shall be raised in equal sixth shares, that is, one out of the rents of the hereditaments comprised in each of the other schedules (a).* And I direct that the trustees or trustee for the time being under this my will, shall from time to time, by and out of the said annual sum of 1600*l.*,  
in

(a) This was the passage upon which the question arose.

in the first place pay and discharge all the interest due ~~and~~ to accrue due in respect of the mortgage debts ~~charged~~ on the same devised estates, or any of them, ~~until~~ such debts shall be discharged under the trusts of ~~this~~ my will; and shall in the next place from time to ~~time~~ invest so much of each half-yearly payment of the ~~said~~ sum of 1600*l.* as shall not be required to pay such interest, in the names or name of the trustees or trustee for the time being, under this my will, in some or one of the public stocks or funds of *Great Britain*; and shall from time to time accumulate and invest in like manner, as or in the nature of compound interest, the annual income of such stocks or funds, and of all accumulations arising therefrom, until a fund sufficient to pay off all the mortgage debts charged on the same devised estates, or any of them, shall have been formed by means of such investments and accumulations; and when such sufficient fund shall have been so formed, I direct that the same shall be paid and applied by the trustees or trustee for the time being, under this my will, in payment and satisfaction of all such mortgage debts; and in case such fund shall from any unforeseen cause be more than sufficient to pay off all the same mortgage debts, and to defray the costs, charges, and expenses attending such payment, and obtaining reconveyances from the respective mortgagees, such surplus shall be subject, in seven equal shares, to the same trusts as the rents and profits of the same devised estates shall then be subject to under this my will. And I do hereby empower the trustees or trustee for the time being, under this my will, from time to time, if they or he shall think fit so to do, to apply all or any part or parts of the fund to be accumulated as aforesaid, in the partial or total discharge, in such order as they or he shall think fit, of any of the said mortgage debts, notwithstanding such accumulated fund shall not then be sufficient to discharge the whole

1852.

HART

v.

TULK.

1852.

HART  
v.  
TULK.

whole of the said mortgage debts; but then and in any such case, and from time to time until all the said mortgage debts shall be paid off, there shall be raised half yearly, in equal shares, out of the rents of such of the hereditaments comprised in the said schedules, as shall be liable to contribute equally to the raising the said annual sum of 1600*l.*, such a yearly sum or such yearly sums of money as shall be equal in amount to the interest of the mortgage debt or debts so paid off; and such yearly sum or sums shall be from time to time accumulated and added to and held upon the like trusts as are hereinbefore declared concerning the said fund hereinbefore directed to be accumulated as aforesaid. And subject and without prejudice to the trusts hereinbefore declared, I direct that the said hereditaments hereinbefore devised shall be respectively held upon the trusts following, that is to say: as to such of the same hereditaments hereinbefore devised, as are comprised in the first schedule hereinafter contained, in trust for my son *Augustus Henry*, his heirs and assigns for ever. And as to such of the same hereditaments hereinbefore devised as are comprised in the second schedule hereinafter contained, in trust for my son *Edward Hart*, his heirs and assigns for ever. And as to such of the same hereditaments hereinbefore devised, as are comprised in the third schedule hereinafter contained, in trust for my son *John Augustus*, his heirs and assigns for ever. And as to such of the same hereditaments hereinbefore devised, as are comprised in the fourth schedule hereinafter contained, in trust for my son *James Stuart*, his heirs and assigns for ever." And as to such of the same hereditaments thereinbefore devised, as were comprised in the fifth schedule thereinafter contained, the testator directed that the trustees or trustee for the time being under that his will should, during the life of his daughter *Caroline Augusta Gordon*, pay the rents and profits of the  
said

1852.

  
HART  
v.  
TULK.

said hereditaments comprised in the fifth schedule, for her separate use, but not by way of anticipation ; and that after her decease the hereditaments comprised in the fifth schedule should be held, but subject nevertheless and without prejudice, to the life interest (if any) which she might have appointed in the same hereditaments or any part thereof, to any husband who might survive her, under a power thereafter given to her, in trust for all and every such of the children (if more than one) of his said daughter Mrs. Gordon, who being a son or sons should live to attain the age of twenty-one years, or being a daughter should live to attain that age or be sooner married, equally to be divided between or among them, share and share alike, and for their respective heirs and assigns for ever ; with the usual powers for maintenance, and a limitation to her in fee, in case there should be no child of his daughter Mrs. Gordon, who being a son should live to attain the age of twenty-one years, or being a daughter should live to attain that age or be sooner married. And as to such of the same hereditaments thereinbefore devised, as were comprised in the sixth schedule thereafter contained, the same hereditaments should be held by the trustees or trustee for the time being, under that his will, upon such and the like trusts, and with such and the like powers and provisions in all respects, for the benefit of his daughter Mrs. Ley and her children and child, and their and her respective heirs and assigns, as were thereinbefore declared concerning the hereditaments comprised in the fifth schedule, for the benefit of his daughter Mrs. Gordon and her children and child, and their and her respective heirs and assigns as aforesaid. And as to such of the same hereditaments thereinbefore devised, as were comprised in the seventh schedule thereafter contained, the same hereditaments should be held by the trustees or trustee for the time being of that



1852.

HART

v.

TULK.

that his will, upon such and the like trusts, and with such and the like powers and provisions in all respects, for the benefit of his daughter Mrs. *Cottrell* and her children and their and her respective heirs and assigns, as were thereinbefore declared concerning the hereditaments comprised in the fifth schedule, for the benefit of his daughter Mrs. *Gordon* and her children and child, and their and her respective heirs and assigns as aforesaid. Provided nevertheless, and the testator thereby empowered each of his three daughters, by any deed or deeds with or without power of revocation, or by her will or any codicil or codicils thereto, or any writing or writings in the nature of will or codicil, to appoint all or any part or parts of the hereditaments thereinbefore devised, to be held in trust for such daughter during her life as aforesaid, unto or to be held in trust for the benefit of any husband who might survive such daughter during his life.

The suit was instituted to carry into effect the trusts of the will, and the question was, whether the words "fourth schedule" in the passage of the will set out in *italics* at p. 304, *suprà*, must not be construed as "fifth schedule."

The Vice-Chancellor decided this question in the negative.

Mr. *Wigram*, and Mr. *Elmsley*, were for the Appellant *James Stuart Tulk*.

When the circumstances ascertained by the Master's report are adverted to, it is clear that the word "fourth" was a mere clerical error. The testator had in view two objects, one, to raise 1600*l.* a year to pay off the mortgages, the other, to provide for his children with as near an approach to equality as was conveniently practicable. The directions of the will as to raising the annual sum of 1600*l.*, could not, without correcting the clerical error,

be

be carried into effect ; for when the house is rebuilt on the land comprised in the fourth schedule, the income of that property will be about 600*l.*, leaving 1000*l.* to be divided into six equal shares of 166*l.* 13*s.* 4*d.*, one of which, if the correction is not made, would have to be paid out of the income of the property comprised in the fifth schedule, that income being only 133*l.* 10*s.* If the obvious correction is made, the whole scheme is consistent and probable.

1852.  
HART  
v.  
TULK.

They cited *Langston v. Langston* (a), *Garvey v. Hibbert* (b), *Coryton v. Helyer* (c), *Doe v. Martin* (d), *Py-croft v. Gregory* (e), *Lowe v. Lord Huntingtower* (f), *Coles v. Hulme* (g).

Mr. Malins, and Mr. Moxon, for the Plaintiffs.

As to the infant Plaintiffs, no consent can of course be given ; but as to the adult Plaintiffs, *Edward H. Hart* and *John Augustus Tulk*, they are satisfied that the testator intended equality among his seven children, and that the error is a clerical error, and are desirous that the error should be corrected.

Mr. Russell, and Mr. Daniel, for the Defendants Mr. and Mrs. Ley, Mrs. Gordon, and their children.

There is no ambiguity upon the will as it stands ; it can be as rationally construed with one reading as the other. There is no evidence that equality was intended ; the contrary appears upon the will. There may have been reasons why *James S. Tulk* should have the annual sum of 250*l.* only, until the piece of vacant ground should be let, "and" all the mortgage debts paid. There is no

case

(a) 2 C. & F. 194 ; 8 Bligh,  
N. 8. 167.

(b) 19 Ves. 124.

(c) 2 Cox, 340.

(d) 4 B. & Ad. 771.

(e) 4 Russ. 526.

(f) 4 Russ. 532, n.

(g) 8 B. & C. 568.

1852.

HART

v.

TULK.

case where, in such circumstances, the Court has substituted one word for another.

They cited *Newburgh v. Newburgh* (a), *Sugden* on the Law of Property, pp. 206, 367, 370, 371; 1 *Jarman* on Wills, 353; *Doe v. Taylor* (b), *Miller v. Travers* (c), *Day v. Trig* (d). They also referred to *Langston v. Pole* (e).

The LORD JUSTICE KNIGHT BRUCE referred to *Attorney-General v. Grote* (f).

Mr. *Shebbeare* appeared for the Defendant *Augustus Henry Tulk*, who was desirous that the error might be corrected.

Mr. *Follett* and Mr. *Cottrell*, for the Defendants Mr. and Mrs. *Cottrell*, supported the view taken on behalf of Mrs. *Ley* and Mrs. *Gordon*.

Mr. *Wigram*, in reply.

*Cur. adv. vult.*

The LORD JUSTICE KNIGHT BRUCE.

The question in this case may be difficult, but is one merely of construction. The words to be construed being the words, "the said fourth schedule," occurring in a particular part of the will of the late Mr. *Charles Augustus Tulk*, namely, in this passage of it:—

[His Lordship read the passage set out in italics, above, p. 304.]

Of course those who have to perform the office of interpretation can, in exercising that function, be only guided,

(a) 5 *Madd.* 364.

(b) 10 *Q. B.* 718.

(c) 8 *Bing.* 244.

(d) 1 *P. W.* 286.

(e) Cited in *Langston v. Langston*, 2 *C. & F.* 205, 206.

(f) 3 *Mer.* 316.

guided, only helped, by the contents, the whole contents, of the will itself, illustrated by such extrinsic evidence as “the rules of law respecting the admission of extrinsic evidence in aid of the interpretation of wills,” allow to be taken into consideration for that purpose, —rules towards the knowledge and in the application of which the collection of authorities made by Sir *James Wigram*, his arrangement of those authorities, and his able and judicious remarks on them, in his excellent book,—the phraseology of whose title-page I have just been borrowing,—afford most valuable assistance.

1852.

HART  
v.  
TULK.

The testator had sons and daughters. He was the owner of real estates of considerable value, comprising much house property, and his plan was to divide his real estates, or what was probably the bulk, if not the whole of them, into as many portions as he had children, save one, and to allot one of the portions to each child, except a son, whom he stated that he thought another relative had sufficiently provided for. This scheme he intended to carry into effect by incorporating into his will schedules of the estates, each schedule applicable to one child, and describing that child's share of them severally. The value or rental of them when he made his will is known. It so appears, that, without exact equality, there was a near approach to equality between the schedules, perhaps as near an approach as could well, by the nature of the case, be permitted,—a remark, however, that has no place without reckoning for this purpose, as part of the share apportioned to Mrs. *Gordon*, one of his daughters, some houses or real property that, upon the occasion of her marriage, which was some years before his will, he had settled upon her by deed; nor is the remark well founded without ascribing to him an opinion, (which the language of the will renders not unreasonably ascribable

1852.

HART

v.

TULK.

ascribable to him,) that a parcel of land in *Leicester-square*, vacant and unlet when he made his will, which formed part of the share allotted by it to one of his sons, *James Stuart Tulk*, would ere long be let, so as to produce an income not merely nominal. It must be assumed also, for this purpose, that the mortgages which affected part, if not the whole, of his real estates were discharged. But the discharge of these mortgages entered into his scheme, which included a provision for raising a fixed annual sum out of the income of the devised property, to be applied for that purpose until the discharge should be effected; and in discharging these, and arranging the manner of contribution, he drew or attempted or meant to draw a distinction or line between the time anterior to the letting of the vacant land in *Leicester-square*, and the time subsequent. Upon this division of the will it is that the controversy has arisen,—a controversy on which it is contended that light is thrown by the circumstance that an annuity given by the will to *Mr. James Stuart Tulk* out of the general personal estate, was made to cease upon the letting of the vacant land. The land has been let, and the annuity having ceased, the manner of reading the will,—that stands adopted by the decision before us,—leaves *James Stuart Tulk* now and for years to come without the means of subsistence, at least under that instrument. It does not appear that he has any other provision. The testator does not seem to have had less affection for him than for any other of the children, and while living made him a voluntary allowance more than nominal.

As to the disputed construction, the nature of this case is such that the words to be construed cannot reasonably be suggested to have any other meaning than one of these two: they mean, namely, either “the said fourth schedule,” or “the said fifth schedule;” and as the Appellant

1852.

HART

v.

TULK.

appellant supports the latter of these two constructions, upon him obviously the burthen of the controversy lies, since that, *primâ facie* and presumptively, "fourth" must mean "fourth" none will deny. The rule of reason and law being well expressed by *Marcellus* (Dig. 32, 69) where he says:—*Non aliter a significatione verborum recedi oportet quàm cum manifestum sit aliud sensisse testatorem.* The Appellant, however, has good grounds for saying that if the word "fourth" could be dropped, and the words to be construed could be read as if they were merely "the said schedule," the result would, upon a just interpretation of the instrument, be the same as if the word "fourth" were turned into "fifth." No one can rationally, we think, doubt as to that proposition, by which the Appellant may be considered as gaining something. He would not lose, certainly, by being subjected, as to the contested word, to the rule of *Paulus* (Dig. 34, 5, 3):—*In ambiguo sermone non utrumque dicimus sed id duntaxat quod volumus. Itaque qui aliud dicit quàm vult neque id dicit quod vult significat quia non vult, neque id quod vult quia id non loquitur.* It is indeed manifest, we conceive, that if the words are construed in the manner for which the Appellant contends, the whole will may be fairly deemed the well-considered will of a rational, careful, prudent, and just man, so far as we have the means of forming judgment on the subject; but that, if the words are construed otherwise, the will (so far, I say again, as we have the means of judging) appears to be one of an eccentric kind, capricious, arbitrary, and, in the sense in which the phrase may be used as to such a matter, unjust. This, however, though something in his favour, is course not everything, for testators have a right to be eccentric, capricious, arbitrary, and, so far as the term may be used, unjust; nor does it seldom, I believe, happen that they have reasons known to themselves, though

1852.

HART  
v.  
TULK.

though not to those who expound their wills, for dispositions seemingly strange and unreasonable. Testators are not bound to have good or any reasons for what they do, or when they have reasons to state them. But in the present instance the clause under consideration, read as the Respondents adverse to the Appellant would have it read, is not merely startling or ridiculous: the case has that ingredient, and also something more. The other parts of the will show evidently and explain that in the passage in question, the word "fourth" was written inadvertently, and without meaning, or in sheer mistake by a mere error of the pen. So, at least, we view the matter; and though differing from a Judge for whose learning and ability we entertain the highest respect, we own that we think the Appellant right. Indeed, the Vice-Chancellor appears to have thought that the views and wishes of the testator were or would be disappointed by not rejecting this word "fourth," or not reading it as the Appellant desires to have it read, though his Honor considered himself precluded by the law from giving effect so far to them. It is as to that portion of his opinion alone that we differ from him,—a conclusion to which we have not come without referring to several authorities of more or less direct application, the names of some of which may not be quite a waste of time to mention. I may specify (besides *Lowe v. Lord Huntingtower* (a)), *Doe v. Chichester* (b), *Miller v. Travers* (c), *Doe v. Martin* (d), *Doe v. Hiscocks* (e), and *Attorney-General v. Grote* (f), on the appeal, as well as before Sir *W. Grant*; and (besides *Langston v. Langston* (g)), *Brackenbury v. Brackenbury* (h), *Doe v. Halley* (i), *Church v. Mundy*

(a) 4 *Russ.* 532, n.(b) 4 *Dow. P. C.* 65.(c) 8 *Bing.* 244.(d) 4 *T. R.* 39.(e) 5 *M. & W.* 363.(f) 3 *Mer.* 316.(g) 2 *C. & F.* 194; 8 *Bligh, N. S.* 167.(h) 2 *Eden*, 275.(i) 8 *T. R.* 5.

*Mundy* (a), and *Chambers v. Brailsford* (b) on the appeal as well as at the Rolls, *Milner v. Milner* (c), *Boon v. Cornforth* (d), *Coryton v. Helyer* (e), *Doe v. Stenlake* (f), *Pybus v. Smith* (g), *Coles v. Hulme* (h), and *Doe v. Gallini* (i).

1852.

HART  
v.  
TULK.

The will before the Court satisfies us that, in the opinion of the testator when he made it, the vacant land, in *Leicester-square*, then unlet, was sure to be unproductive of income until it should be let. The will moreover convinces us that the main and leading parts, or among the main and leading parts, of his intention and scheme in making it, were these: First, not to leave his son *James Stuart Tulk* for any period or at any time without a substantial income under it. Secondly, to devote to the discharge of the testator's mortgage debts until their full payment, the whole income of that portion of his property, which in addition to what was settled on Mrs. *Gordon* in 1834, was allotted to her by the will. This view, it is true, saves the testator's dispositions (if that could otherwise be a right expression) from being turned into something like a chaos, and rescues his memory from the imputation of having dealt with his property, so far as we can form a judgment on the subject, unreasonably and unparentally. But though not therefore, yet not the less does it in our opinion also warrant us, consistently with sound interpretation and the strictest rules of law, in holding as we do that the word "fourth," in the place in question, must be treated as there without design, without meaning, and *merum per errorem scribentis*.

The

- |                               |                           |
|-------------------------------|---------------------------|
| (a) 12 Ves. 426.              | (f) 12 East, 515.         |
| (b) 18 Ves. 368; 19 Ves. 652. | (g) 1 Ves. jun. 189.      |
| (c) 1 Ves. 106.               | (h) 8 B. & C. 568.        |
| (d) 2 Ves. 277.               | (i) 3 Ad. & El. 340; 5 B. |
| (e) 2 Coz, 340; Burr. 923.    | & Ad. 621.                |



1852.

HART

v.  
TULK.*The* LORD JUSTICE LORD CRANWORTH.

I desire to add but very few words to what has just been stated by my learned brother. A consideration of the figures legitimately before us on the report tends strongly to confirm the arguments derived from the other circumstances. For it may fairly be presumed that the testator was aware of the value of what he had included in his several schedules, nearly the whole of which was at his death held on leases granted by himself, or which had existed before he became possessed of the property. It appears then, on the report, that the rental of what is included in the several schedules is as follows: [His Lordship read it to the effect above stated].

It also appears that on Mrs. *Gordon's* marriage property was settled on her of the annual value of 461*l.* 5*s.*, so that every child provided for by the will (except *James*) had about 600*l.* per annum. *James*, it is true, had, until the vacant ground should be let, only 431*l.*, i. e. 181*l.* from the property in the fourth schedule, and 250*l.* from the general assets. Still, equality seems to have been the general intention.

Now if the word "fourth" is not to be treated as a mere clerical error, it is plain that the directions of the will for raising the 1600*l.* could not possibly be carried into effect unless the vacant ground should be let for at least 618*l.* per annum. The testator could not oblige Mrs. *Gordon's* share, comprised in the fifth schedule, to contribute above 133*l.* 10*s.*, being its full amount; and as all the schedules except the fourth were to contribute an equal sum, the whole sum raised from them could not exceed six times 133*l.* 10*s.*, i. e., 801*l.*, thus leaving 799*l.* to be paid by the fourth schedule; and as that schedule, exclusive of the vacant ground, produced only 181*l.*, it follows that the testator's intentions could not be accomplished

published unless the vacant ground should be let for at least 618*l*. Indeed it must be let for much more; for the sum supplied by the fifth schedule, Mrs. Gordon's share, could only be the net yearly rent after deducting income tax and any other sums which might from time to time be payable for repairs, loss of rent, or other contingencies; and as the gross income of the fifth schedule was only 133*l*. 10*s*., the net income would be much less.

1852.  
HART  
v.  
TULK.

It is unnecessary to pursue the calculations. The result is clear, that the provision made by the testator would become impossible so soon as the vacant ground should be let, unless it should be let at a rent far beyond what he could possibly have contemplated as certain to be produced. The testator must, on a fair construction of the will, be considered as directing an accumulation which, under all contingencies, it would be possible to make. He was evidently proceeding on calculations carefully made with a view to a particular object. But unless we hold the word "fourth" to have been inserted by mistake, to have been a mere *lapsus plumæ*, many cases might arise, nay, would be very likely to arise, in which his expressed object would be impossible. This, as I think, affords irresistible and legitimate grounds for holding that there must be some clerical error. And the context shows what that error is, namely, the use of the word "fourth" instead of "fifth," or (which is the same thing) the insertion of the word "fourth" where there ought to have been no numerical designation of the schedule at all. If the word "fifth" be read for "fourth," or the word "fourth" be struck out altogether, then the accumulation will under all circumstances not only be possible, but easily made, and will be made as soon as the vacant ground is let, as nearly as possible on the same principle as before that event. Add which, such a construction leaves undisturbed the testator's

1852.

HART

v.

TULK.

testator's general intention of distributing his property equally, or nearly equally, among all his children, and does not interfere with the previously expressed intention of appropriating the whole of Mrs. *Gordon's* share under the will, to the accumulating fund during the whole period of accumulation. •

## MONEY v. JORDAN.

April 26, 27,  
28, 29.

May 29.

Before The  
LORDS JUSTICES.

During a treaty for a marriage, which afterwards took place, a bond creditor of the intended husband, who was an intimate friend of his

THIS was the appeal of two of the Defendants, Mr. and Mrs. *Jordan*, from a decree of the Master of the Rolls granting a perpetual injunction against proceedings at law on the part of the Appellants upon a bond and a judgment for 1200*l*.

The Appellant Mrs. *Jordan*, until her marriage with the other Appellant, which took place in the year 1847, was Miss *Louisa Marnell*. On the death of her brother, Mr.

family, and was aware of the proposed marriage, repeatedly declared it to be her determination never to enforce payment of the bond debt, and made these declarations under circumstances which were calculated to lead, and which did lead, to the communication of them to the friends of the intended wife. *Held*, by the Lord Justice *Knight Bruce*, agreeing with the Master of the Rolls, that the declarations above mentioned afforded possibly sufficient ground for the interposition of a Court of equity to restrain proceedings at law upon the bond, and there being, in addition, the testimony of one witness to a positive promise to the above effect, in consideration of another promise on the part of the witness, which he performed, *Held*, that although this promise was denied by the answer yet that the answer, being in many respects inaccurate, showed that the Defendant's memory could not be depended on, so that the testimony of the witness ought to prevail, and that the case was a proper one for a perpetual injunction, a decree for which was accordingly affirmed, *dissentiente*, Lord *Cranworth*, who held, that the declarations being of intention merely, and not of fact, were not such representations as to bind the creditor, on the ground of fraud or otherwise, and that an actual contract could not, in opposition to the answer, be considered proved by the evidence of one witness.

*Held*, that forbearance to make a new settlement upon an intended marriage, would be a sufficient consideration to support the release of a debt due to a person who was a *cestui que trust* under an existing settlement, which appeared to be voluntary, although it might be doubtful whether that settlement was voluntary, or could have been defeated by a subsequent settlement.

## CASES IN CHANCERY.

endeavours were made, after the announcement of the Plaintiff's intended marriage, to obtain Miss *Marnell's* consent to the destruction or delivery of the document, which every one appeared to have considered as in force, notwithstanding the judgment, and as representing the debt. But the bond was still kept by herself, or for her by a solicitor, who was not desirous that it should be given up.

In 1847, Miss *Marnell* married Mr. *Jordan*, and some time afterwards they required payment of the 1200*l.* and threatened to proceed upon the judgment, whereupon the present suit was instituted against them, and the common injunction was obtained, and continued to the hearing.

In addition to the facts, of which a brief summary is above given, the bill stated, and Mr. *Money* the father of the Plaintiff (a witness in the cause, who had died since his examination), deposed that shortly before the marriage of the Plaintiff, the witness had a conversation with Miss *Marnell* respecting the then intended marriage of the Plaintiff, and that, on that occasion, the witness reminded her of certain property at *Midnapore* in *India*, which he had settled upon her without any consideration, and said, that as the Plaintiff was about to be married, the witness should settle that property at *Midnapore* on the Plaintiff, unless Miss *Marnell* wholly relinquished all claim on the Plaintiff, for or in respect of the testator's estate; and that Miss *Marnell* in reply said, "No, don't do that: I will never make any claim on your son *William* for or in respect of that debt, if you will let me remain in possession and enjoyment of the *Midnapore* property." The witness also said that it was on the occasion of that interview agreed by and between Miss *Marnell* and himself, that in consideration of his permitting her to continue in the possession and enjoyment

sation with her on the subject of the bond, and her son *William Money's* then intended marriage, when the witness said to Miss *Marnell*, "You have long given up the debt, so it's only a nominal thing, and it's no use your keeping a paper you have long since promised you would never enforce." She replied: "I will be trusted;" to which the witness replied, "Who talks of not trusting you? But you may marry, and then you would be at the command of your husband." She then said that she wanted to keep the bond, in case she could ever use it against *Hooper* (one of the co-obligors). The witness replied: "If you'll give it to me I shall insure it never can be used against *William*, and I promise to return it to you if ever you require to use it against *Hooper*." To this she said: "I give you my word of honour that I will never use it against *William*; but I will be trusted, and I will keep it." "Besides," she added, "you know very well that I have made my will, and that *William* is heir to every sixpence I have got; and after my death he will find that bond among my papers, and he may burn it or do with it what he likes."

1852.  
 MONEY  
 v.  
 JORDAN.

*Lady Poore*, the mother of the Plaintiff's wife, was examined, and deposed that a settlement was executed on the marriage of her daughter with the Plaintiff, in August 1845. The first life interest in the property of her daughter was settled on the Plaintiff by this settlement. The witness had, on various occasions previous to the Plaintiff's marriage with her daughter, heard of the bond and the particulars connected therewith, and of the abandonment of the debt. The witness first heard of such abandonment of the debt from the Plaintiff, and afterwards from his brother; the witness spoke to the Plaintiff's father on the subject, who informed her that the debt was entirely at an end, and that Miss *Marnell* had given up or abandoned it, in consequence of the kindness

1852.  
 MONEY  
 v.  
 JORDAN.

kindness which *George Money*, the father, had shown to Miss *Marnell* and her brother when they were in *India*. She further deposed, that the Plaintiff married on the faith of the abandonment of the debt, as she knew from the statements which he and his father and brother made to her at the time, and previously to the preparation of the settlement; and that it was upon the faith of the debt being so abandoned, that the witness consented to the first life interest in the property of her daughter being settled upon the Plaintiff; and that she would not have permitted such settlement to be executed if she had not confided in such abandonment.

Mr. *Roundell Palmer*, and Mr. *Bates*, for the Plaintiff, cited *Gale v. Lindo* (a), *Neville v. Wilkinson* (b), *Hammersley v. De Biel* (c), *Hobbs v. Norton* (d), *Cross v. Sprigg* (e), *Wekett v. Raby* (f), *Kirk v. Clark* (g), *Scott v. Scott* (h), *Pearson v. Morgan* (i), *Podmore v. Gunning* (k), *Flower v. Marten* (l).

Mr. *Willcock*, and Mr. *F. T. White*, for the Appellants, cited *Montefiori v. Montefiori* (m), *Pasley v. Freeman* (n), *Ames v. Milward* (o), *Maunsell v. White* (p).


Mr. *Roundell Palmer*, in reply.

[The LORD JUSTICE KNIGHT BRUCE, during the argument, referred to *Haigh v. Brooks* (q).]

The

- |                                           |                                  |
|-------------------------------------------|----------------------------------|
| (a) 1 <i>Vern.</i> 475.                   | (i) 2 <i>Bro. C. C.</i> 388.     |
| (b) 1 <i>Bro. C. C.</i> 543.              | (k) 5 <i>Sim.</i> 485.           |
| (c) 12 <i>Cl. &amp; Fin.</i> 45.          | (l) 2 <i>My. &amp; Cr.</i> 459.  |
| (d) 1 <i>Vern</i> 136.                    | (m) 1 <i>W. Black.</i> 363.      |
| (e) 6 <i>Hare</i> , 552.                  | (n) 3 <i>Term Rep.</i> 51.       |
| (f) 2 <i>Bro. P. C.</i> 386, <i>Toml.</i> | (o) 8 <i>Taunt.</i> 637.         |
| ed.                                       | (p) 1 <i>Jo. &amp; Lat.</i> 539. |
| (g) <i>Prec. Ch.</i> 276.                 | (q) 10 <i>Ad. &amp; El.</i> 309. |
| (h) 1 <i>Cox</i> , 366.                   |                                  |

**The** LORD JUSTICE KNIGHT BRUCE, after stating the circumstances under which the bond was given, and after adverting to the evidence respecting the declarations of Miss *Marnell*, with reference to the debt, proceeded as follows:—

1852.  
  
 MONEY  
 v.  
 JORDAN.

It appears that in the year 1833 or earlier, a conveyance of a house and land at *Midnapore* in *India*, from Mr. *Money* to Miss *Marnell*, was executed by him. It was on the face of it for a stated pecuniary consideration. That consideration, however, was not paid; and on one side it is said that the conveyance was intended to be, and was purely, gratuitous, and a mere gift; on the other, that there was some valuable consideration. Of the true nature and circumstances of that transaction it is possible that we may not be—but the parties to it must have been—fully informed. On neither side, however, has the slightest imputation been cast on the character of Miss *Marnell*, with whom indeed Mrs. *Money*, after their return to *England*, was on terms of intimacy. On the whole, it seems to me difficult, I may probably say impossible, upon the evidence to conclude that there was a valuable consideration for the conveyance. But this at least is very clear, that whatever the true facts may have been, there were, down to the time of the Plaintiff's marriage, or at least of the agreement between his father and Miss *Marnell*, that I shall presently mention, plausible grounds for contending that the conveyance was merely voluntary, and rational cause for apprehending that it might not improbably, in case of dispute, be decided to have been so. I have now, after adding the fact, that the father had two sons in the legal profession, (one of them the Plaintiff, who, in or soon after the year 1842, quitted the army with a view to being, as he has since been, called to the bar,) said enough to introduce the testimony of Mr. *Money* as one  
of

1852.  
 MONEY  
 v.  
 JORDAN.

of the numerous witnesses examined for the Plaintiff, which is thus :—

[His Lordship read the deposition of the Plaintiff's father, the effect of which is set out above.]

Now, in what Mr. *Money* has deposed, and especially upon the 9th and 10th interrogatories, is he a witness of truth and accuracy? and if he is, how ought the cause to stand affected by his depositions to those two interrogatories? These appear to me important questions. The natural bias upon Mr. *Money's* mind, or his natural wish in favour of his son, especially upon a matter connected with such transactions as those in which the son had been involved, by or at least with Mr. *Marnell*, must have been strong. But that bias or wish, though rendering it proper to watch closely and with some jealousy the evidence given by the witness, does not necessarily render him incredible or his testimony, even if unconfirmed, not fit to be acted on. Mr. *Money*, who is now dead, has, in point of reputation and character, not been assailed. No imputation upon him, beyond that of inaccurate recollection, has been made by the Appellants' counsel, and I must consider him, whether accurate or not accurate, as a sincere witness. His profession, and the offices that he appears to have filled, may be thought more likely to have produced habits of accuracy than the contrary, and it seems difficult or impossible to believe that what he has said, at least in answer to the 9th and 10th interrogatories, can have been honestly inaccurate in any material respect. But it is to be recollected that the account given on oath by Mr. *Jordan* of what passed at the interview of which he thus speaks, and to which the bill pointedly refers, is materially different from his, and that what she positively states on the record must, for the present purpose, be treated




1852.  
 MONEY  
 v.  
 JORDAN.

ciency of lawyers in their own affairs has passed into a proverb. However, it appears to me perfectly consistent with believing all that Mr. *Money* has sworn, to suppose that had he asked the lady to sign a paper, she would, either on the score of Mr. *Hooper* or from waywardness, have refused.

Miss *Marnell* had, it is true, no advice at the interview, nor upon the subject to which it related did she, I think, need advice. The evidence satisfies me that she was then and before aware perfectly of every fact and every circumstance material to her to know, including the right which (as she viewed the case) *Charles Browne Marnell*, at the time of his death, and she, as his representative, had to enforce against the Plaintiff the whole demand of 1200*l.* with interest, though, as to part at least of the claim, she probably or certainly thought that the exercise of the right would have been and would be harsh and illiberal, an opinion that I should find it difficult to term erroneous. I do not forget that here and there in the evidence some passages occur, which by themselves might lead to a supposition that she considered the Plaintiff's strict liability not to have been for more than a share. The true view, however, of the whole evidence taken together is, in my opinion, as I have said, certainly otherwise. .

Again, I do not believe that Miss *Marnell* acted at the interview under an impression that she had before bound herself so as to bar her in a court of justice. The very subject and nature of the conversation preclude that supposition, even if the answers rendered it admissible. And upon the evidence, I am of opinion that no misrepresentation was made to Miss *Marnell*; that no advantage was taken of her, and that she was as free an agent, and as free from influence, at the interview as Mr. *Money* himself. She may possibly, in making the agree-  
 men

**ment** made at it have not been actuated exclusively by **motives** or views of mere bargain and sale. That, however, can make no difference if the agreement was one of good sense and prudence. I think that it was so. I think that, regarded in the most mercantile point of view — considered as the merest matter of business—it was favourable to her, was a contract by which she gained, to say nothing of peace—nothing of tranquillity—nothing of unbroken friendship. These I do not reckon as benefits, because they are perhaps so considered by neither of the Appellants. I say “neither,” inasmuch as the wife has answered as she has, though the legal proceedings on the judgment were those of the husband; and if he allowed himself to be deceived or misled, he ought not to have done so, having had the means of setting himself right.

1852.  
  
 MONEY  
 v.  
 JORDAN.

To return, however, to the interview, I say, (though it is perhaps mere repetition to say,) that had a disinterested lawyer of discretion, experience, skill, and integrity, informed of all the facts, been present on the occasion, and advising Miss *Marnell*, his advice to her, I believe and am convinced, would have been to enter into the agreement and faithfully to adhere to it, for the sake of her own interest merely, without regard to any other motive. The Plaintiff, at the time, seems to have been without any means of payment. Proceedings against him, even as matters then stood, might not improbably have led to a Chancery suit of doubtful result. There was neither legal, nor equitable, nor moral claim on the father. The *Midnapore* property, which produced an income that had nearly, if not altogether, supported her before *Charles Browne Marnell's* death, and was still a matter of consequence to her, might well have been lost (I think that probably or certainly it would), by the father settling it on the son's marriage, but was in my opinion worth more than the debt. It is not material to consider

1852.  
 MONEY  
 v.  
 JORDAN.

der whether Mr. *Money* acted generously in thus availing himself of the *Indian* estate. If it were, perhaps an apology might be found in the manner in which his son had been dealt with, and the part that *Charles Brown Marnell* had taken in a transaction, censurable, even had it been free from the sin of ingratitude.

The irrevocable step of the Plaintiff's marriage, which took place after the interview, did so in conformity to what then passed, without any settlement of the *Midnapore* property being made or attempted, nor was the father or the Plaintiff capable afterwards of being restored to the position in which they had previously been. Considering as I do that the marriage was had with such and only such a settlement as was in fact made upon it,—in the belief created or sanctioned by Miss *Marnell*,—in the faith induced by her language and conduct, that the debt in question never would be in the whole or in part demanded; and so thinking (independently of Mr. *Money's* evidence), I should possibly have held the decree before us to be altogether correct if he had not been examined. But his testimony forms part of the case; I believe him to be substantially accurate as a witness, and so believing, I find that he proves an agreement with Miss *Marnell* for valuable consideration, by which she was, in my opinion, at and before the time of her own marriage, bound,—bound, I think, upon equitable as well as legal principles,—nor the more, though certainly not the less, for the high authority of the case of *Haigh v. Brooks* (a). It was a breach of that agreement to seek to enforce the bond or the judgment obtained by Mr. *Marnell* (under whatsoever circumstances of credit or discredit to his memory) against the Plaintiff, a breach in respect of which, if not the only

(a) 10 *Ad. & El.* 309.

only proper person, he was at least a proper person to sue, for he was told of the agreement before his marriage, and told that he might safely marry, safety meaning freedom from the debt. That communication to him must be taken to have been authorized by Miss *Marnell*, and he must be taken to have married on the faith of it. If any objection could have been made at the Rolls, or here, on the ground of a personal representative of Mr. *Money* not being made a party to the suit, that objection I regard as waived.

1852.  
 MONEY  
 v.  
 JORDAN.

I hold, therefore, with the decree, a decree possibly not unsuitable to the original merits, but certainly, in my judgment, forming a fit and just conclusion to the later history of this much-celebrated bond.

*The LORD JUSTICE LORD CRANWORTH.*

The facts of this case have been already so fully stated that I do not feel it necessary to repeat them. But not being able to concur in the result at which both the Master of the Rolls and my learned brother have arrived, I feel bound shortly to state the view which I take of the case, though it is hardly necessary to say that I feel great distrust of the accuracy of that view, differing as it does from such authorities.

The Plaintiff rests his title to relief on one of two grounds: either, first, that the marriage having taken place on the repeated assurances of Mrs. *Jordan* that she never would enforce payment of the debt secured by the bond and judgment, it would now be a fraud on her part to act in violation of those assurances; or, secondly, that a valid and binding contract was entered into between the Plaintiff's father and Mrs. *Jordan*, before the Plaintiff's marriage, whereby she stipulated for a valuable consideration, the benefit of which she has had, that she would

1852.  
 MONEY  
 v.  
 JORDAN.

would never enforce payment against the Plaintiff of the money so secured.

The Master of the Rolls decided in favour of the Plaintiff on the first ground. His Honor thought the case was brought within the authorities which establish this principle: namely, that where a person has represented a particular state of circumstances as existing, with a view to induce another to act, or under circumstances when it must have been obvious that another would probably act on the faith of such representation being true, and such person has so acted, there it shall not afterwards be permitted to him who has made such a representation, to enforce against the person whom he has misled, any rights to which he may be entitled by reason of the facts not having been such as he represented. His Honor referred especially to the cases of *Gale v. Lindo* (a), *Montefiori v. Montefiori* (b), *Neville v. Wilkinson* (c).

With the most sincere respect for the judgment of Sir *John Romilly*, I do not think that the doctrine on which he relies is applicable to the case now before us. In all the cases referred to, there had been the misrepresentation of a fact, material in influencing the conduct of the person to whom it was made; and what the Court has done, has been to hold the party making the representation bound by what he has stated. It has considered that it would be to permit a fraud, if it were to allow any one first to gain an object by representing a particular fact to exist, and then when the purpose has been accomplished to turn round and say, I shall now act on the very truth, which is not such as I represented it. In all such cases the Court acts merely on the principle of preventing fraud, not at all on contract. But  
 here

(a) 1 *Vern.* 475.

(b) 1 *Wm. Black.* 363.

(c) 1 *Bro. C. C.* 543.

here there was no misrepresentation of any fact whatever. Mr. *C. B. Marnell* died in 1843. On that event *Mrs. Jordan*, then Miss *Marnell*, as his executrix and residuary legatee became entitled to the money secured by the bond and judgment. That she did, between that time and the Plaintiff's marriage in *June* 1845, repeatedly state her positive determination never to enforce payment of that money, is a point on which I have no doubt. The evidence abundantly establishes that to have been the case. I think further, that she must be taken to have made such statements, though not to Lady *Poore*, the mother of the Plaintiff's intended wife, yet under circumstances when she could not but know that what she said would probably be communicated to her, and might very likely influence her in the arrangements to be made on the occasion of her daughter's marriage. Still there was no fact misrepresented. *Mrs. Jordan* never concealed the existence of the bond or judgment. If she had, with a view to the arrangements to be made on the Plaintiff's marriage, said that she had no legal demand on the Plaintiff; that the debt had been released or paid; or that for any reason the bond or judgment was legally invalid; or had made what amounted to such, a representation; then indeed the cases referred to would be strictly applicable. It would then be a fraud in her now, to attempt to enforce a security which she had so represented as having no valid existence. But no such statement ever was made. *Mrs. Jordan* always stated that she had the bond, and in effect that it gave her a legal right against the Plaintiff, though at the same time she stated that she had abandoned all intention of enforcing it. After such statement, the parties contracting marriage cannot justly say that they were deceived as to the facts. They knew the facts as well as *Mrs. Jordan* herself knew them; that is, they knew that *Mrs. Jordan* had a legal demand on the Plaintiff,

1852.  
MONEY  
v.  
JORDAN.

1852.  
 MONEY  
 v.  
 JORDAN.

Plaintiff, but which, from what had passed, they were fully persuaded she would never enforce.

This is a state of things which does not, as I think, entitle the Plaintiff to any relief in this Court, on the ground of its being fraud in Mrs. *Jordan* now to enforce her securities. But though the Plaintiff may not be entitled to relief on the head of fraud, yet if Mrs. *Jordan* did, before and in consideration of the marriage, bind herself not to enforce the bond or judgment, the Plaintiff might be entitled to relief on the head of contract; which leads me to consider whether, on a fair view of the evidence, she ever did so contract. I lay out of the question for the present the alleged contract with the Plaintiff's father, relative to the *Midnapore* property, and proceed to consider whether, independently of that transaction, Mrs. *Jordan* can be considered ever to have bound herself by contract not to enforce payment of the debt. I confess I think she did not. There is certainly no written contract; but the Statute of Frauds is not insisted on, and we must therefore look to what passed orally on the subject. The evidence on this part of the case rests mainly on the testimony of Mrs. *Money* in answer to the thirtieth interrogatory. [His Lordship read Mrs. *Money's* evidence, the effect of which is stated above.]

Now, what is the fair construction to be put on all this? I think its true result is, that Mrs. *Jordan* refused to abandon her legal right on the bond, though she pledged her word of honour to Mrs. *Money* that she would not act on it. It is as if she had said, "I promise you I will never enforce the bond, but for the performance of that promise you must rest on my word of honour. I will not bind myself by contract on the subject." However disreputable it may be to act in violation of an assurance thus solemnly given, yet I cannot consider it to be a breach of contract, in a case, where

(

(as I interpret what passed) the assurance given was coupled with an implied reservation, that it was not to be considered as binding the party by whom it was made, otherwise than in honour. This view of the case is materially confirmed by the circumstance, that the conversation was addressed not to Lady Poore, but to Mrs. Money,—addressed to her, it is true, under circumstances which must have led Mrs. Jordan to think it highly probable that what she said would be repeated to Lady Poore. Still, Mrs. Jordan might well suppose that the solemn promise which she made to Mrs. Money, amounting to no more than an engagement of honour between herself and Mrs. Money, was a matter in which neither Lady Poore nor the Plaintiff had any concern.

1852.  
 MONEY  
 v.  
 JORDAN.

I confess, therefore, that neither on the ground of fraud nor of contract, am I satisfied that the Plaintiff is entitled to relief, as far as that relief is made to rest on the assurances of Mrs. Jordan to Mrs. Money, that she would never enforce the bond on judgment against her son. Then, is he entitled to relief on the other ground? That is, on the ground of an express contract between the Plaintiff's father and Mrs. Jordan, entered into previously to the marriage. That must depend entirely on the result of the evidence in the cause. There is certainly no written contract; but here again the Statute of Frauds is not insisted on; the want of a written contract does not conclusively bar the Plaintiff's title to relief. The question depends wholly or mainly on the answers of the Plaintiff's father. [His Lordship read the passages the substance of which is set out above.]

Now, as we intimated more than once during the argument, if we can act on that as testimony to which we are judicially warranted in giving credit, the plaintiff has no doubt established a title to relief. Mrs. Jordan,

VOL. II.                      Z                      D. M. G. according



1852.

MONEY

v.

JORDAN.

according to this evidence, certainly bound herself for a valuable consideration never to enforce the bond against the Plaintiff. It was at least doubtful whether Mr. *Money* the father had not the power of defeating Mrs. *Jordan's* title to the *Midnapore* property. The evidence to which I have referred goes to show that he agreed with Mrs. *Jordan*, shortly before the marriage, and with a view to his son's interest on that event, that her title to the *Midnapore* property should never be disturbed, in consideration of an agreement at the same time entered into by her, that she would never enforce the bond. This would be a valid contract, whether in truth Mrs. *Jordan's* title to the *Midnapore* property could or could not be questioned. The doubt existing on the subject was a sufficient consideration, as was established by the case of *Haigh v. Brooks* (a), referred to by my learned brother. If, therefore, it is made out by evidence on which this Court can safely and properly act, that this agreement was in fact come to, then undoubtedly the Plaintiff is entitled to the relief he asks.

But I feel great difficulty in saying that this is evidence on which, according to the doctrine of this Court, it is open to us to act. The agreement is proved by one witness only (Mr. *Money* the father), and the whole allegation in support of which his evidence is adduced, is positively denied by the answer of Mrs. *Jordan*. Now the rule of the Court, acted on from the earliest times on this subject, is clear. It is stated by Lord *Eldon* in *Evans v. Bicknell* (b).

The alleged agreement, then, being as positively denied by Mrs. *Jordan* as it is affirmed by Mr. *Money*; is there anything in the other testimony, or in the surrounding circumstances

(a) 10 *Ad. & El.* 309.(b) 6 *Ves.* 184.

circumstances, enabling the Court to say it will disregard the answer, and act on the evidence of a single witness? I confess I think not. Certainly no one was present at, or privy to, the making of the alleged agreement except the parties, that is, Mr. *Money* and Mrs. *Jordan*. No one, therefore, but they can know what really passed. In such a case, even if the Statute of Frauds had never existed, the father ought surely to have taken care that an agreement so important to the future welfare of his son should be reduced into writing, in order that no doubt might exist as to its terms. If he neglected to do so, is it reasonable to expect that a Court of Equity should afterwards rely so implicitly on the accuracy of his memory, as to act on it in direct opposition to the oath of the only other party to the alleged transaction? That there was no writing may well furnish ground of complaint against Mr. *Money*, who says there was a contract. It cannot do so against Mrs. *Jordan*, who says there was none.

1852.  
 MONEY  
 v.  
 JORDAN.

I rejoice to think, that even if I come to the conclusion that we ought not to act on the testimony of Mr. *Money*, I am not obliged to cast a cloud on his memory by imputing to him intentional misrepresentation. It may well be that some conversation or conversations took place between him and Mrs. *Jordan* previously to his son's marriage, on the subject of the *Midnapore* property and the bond, and that he understood the result to be such as he states in his evidence. But the question is, whether Mrs. *Jordan* so understood it. She had, it must be remembered, no professional or other assistance; she was merely conversing with an old friend, to whom she was under great obligations, on the subject of the approaching marriage of his son, in whose welfare she felt at that time a warm interest; and from all the evidence in the cause, I think it

1852.  
MONEY  
v.  
JORDAN.

extremely improbable that she would mean, by anything passing in such familiar intercourse with her friend, to enter into any contract whatever. At all events, I am unable to regard the case as one in which there is anything to prevent the application of the general rule, not to act against the answer on the testimony of one witness. The nature of the case makes it improbable that there should be any direct testimony confirming or impeaching that of Mr. *Money*. As far as there is any such testimony to which we can listen, I incline to think it is against him.

[After adverting to different portions of the evidence in support of this view, his Lordship said :]—Considering, therefore, that the existence of such a contract rests on the single evidence of Mr. *Money*, not only not confirmed, but rather, as I think, impeached by the circumstances of the case, and that its existence is positively denied by the answer, I confess I do not think that relief can, consistently with the principles and practice of the Court, be given on this second head.

I must add, that I formed this opinion with great distrust of its accuracy, not only from its being at variance with that of my learned brother, but also because it is contrary to the strong impression I had received during the argument.

1852.

PRICE v. MACAULAY.

May 26, 31.

**T**HIS was an appeal from a decree of Vice-Chancellor *Parker*, made upon two claims, and directing the specific performance of two contracts for the purchase of lands comprised in two lots, which with others had been put up for sale at an auction at *Halifax*, on the 26th of *March* 1851. In the advertisements and posting bills of the sale, the property was described as "Valuable Freehold Estate." And the following were the descriptions of the lots in question:—

"Lot 6.—All those 4 valuable closes or parcels of land adjoining to lots 2 and 3, known by the several names, and containing the several quantities: The Little Jug, 1A. 3R. 20P.; The Square Field, 2A. 2R. 37P.; The Far Square Field, 2A. 2R. 21P.; The Well Jug, 1A. 2R. 12P.; Total, 8A. 3R. 10P.

"Lot 7.—All that substantial messuage or dwelling-house adjoining lot 6, now in the occupation of Mr. *Joseph Thompson*, with the garden and 3 closes of land adjoining, known by the several names and containing

the title of one lot was taken after the prescribed time, that it was of copyhold tenure. It however appeared that, under a composition with the lord, the rights of the copyhold were such as to render the tenure hardly different from that of freehold. *Held*, that the misdescription did not form a ground for resisting a specific performance, although the decision might have been otherwise had the misdescription been wilful.

Another lot was described in the advertisements as being sold with a certain reservoir and water-works, yielding a yearly rental of 60*l.*, exclusively of the land and buildings. An objection was taken after the prescribed time, and was supported by the fact that this rent arose from supplying with water certain houses separated from the reservoir by the property of strangers, over which the vendor had no right to carry it, beyond a license from year to year by payment of a rent. *Held*, that the description contained such a misrepresentation as to preclude the vendor from enforcing a specific performance; and that the objection was not one as to title, and therefore was not obviated by the stipulation as to time.

Before *The*  
LORDS JUSTICES.

Land was advertised to be sold in lots as freehold, subject to conditions, one of which was, that all objections to the title, not made within a prescribed time, should be considered as waived; and another of which provided that any misstatement of the quality, tenure, outgoings, or other particulars, should be the subject of compensation. An objection to the

1852.  
 PRICE  
 v.  
 MACAULAY.

the several quantities following: The Cobbler Common, 2A. 3R. 34P.; The Cowroyd, with the sites of buildings, &c., 1A. 0R. 37P.; The Lower Cowroyd, 1A. 2R. 30P.; together with the reservoir and water-works, and valuable supply of water contained in this lot, which, exclusive of the land and buildings, now yields a yearly rental of about 60*l*."

By the conditions of sale it was provided, that the purchaser should be entitled to an abstract of title, deduced for the last forty years, to be prepared and delivered at the expense of the vendor, on or before the 30th day of *June* then next, and that any abstract of title deduced from an earlier date should not be required, except at the expense of the purchaser, who should, within one month from the time of such delivery, give or leave notice in writing at the office of Messrs. *Rudd & Kenny*, the vendor's solicitors, of all objections and requisitions relative to the title; and every objection or requisition of which notice should not be so given or left as aforesaid should be considered as waived, and the title should be deemed as against the purchaser to be approved and accepted, except as to any objection or requisition as to which notice should have been given or left in manner as aforesaid.

The conditions also provided, that any misstatement of the quality, tenure, outgoings, or other particulars of the premises, was to be the subject of compensation.

The Defendant became the purchaser of lot 6 at 700*l*., and of lot 7 at 1310*l*., and the auctioneer, as agent for both parties, signed two agreements for the purchase of the respective lots, subject to the conditions of sale; but there was not attached to the agreement for the purchase of lot 7, or referred to by it, any description similar to that contained in the advertisements and posting bills.

On

On the 30th of *June* 1851, the vendor's solicitors sent to the Defendant the abstracts of title. On the 4th of *July* following, the Defendant returned the abstracts, with a letter denying that he had entered into any contract or agreement for the purchases in question, or had authorized any other person to do so for him; but after some negotiation the Defendant, on the 7th of *October* 1851, wrote to the Plaintiff's solicitors the following letter:—

1852.  
PRICE  
v.  
MACAULAY.

"In pursuance of my letter to you of the 30th *ult.*, I now beg to inform you that I do not attempt to repudiate these sales; I am not, however, prepared to complete them at present, but I trust that on your Mr. *Rudd's* return from *London* arrangements may be made that will be satisfactory to all parties. I have not yet looked at the abstracts, but I take it for granted that a good title can and will be made out."

Upon the abstracts it appeared that the two lots in question were of copyhold tenure.

Upon inquiry into the particulars of the yearly rental of about 60*l.*, stated by the particulars to arise from the reservoir, the Defendant, in November 1851, learned that certain houses at a distance from the reservoir were supplied with water from it by means of pipes, some of which passed through the lands of neighbouring proprietors, being the executors of a Mr. *Haigh*, and others of which passed through the lands of another proprietor named *Barraclough*, and that the Plaintiff paid annual rents of 5*s.* and 10*s.* for these easements. As to the former there was an agreement in writing containing a clause, that the Plaintiff, his successors or representatives, would, on notice that the licence was withdrawn, take up and remove the pipes within one month. As to the latter

1852.  
 PRICE  
 v.  
 MACAULAY.

latter easement, there was no written agreement, and it was held merely at will. The rent of 60*l.* was paid by the tenants of the houses supplied with water.

On making this discovery, the Defendant, on the 15th of *December* 1851, wrote to the Plaintiff's solicitor a letter, the material passages in which were the following :

"Lot 7.—Notwithstanding your note of the 10th instant, I am still convinced that the water rent is considerably less than the sum advertised by you, namely, 60*l.* per annum, and consequently that I am entitled to compensation to be settled in the manner stated in the sixth condition of sale. But if I am charged with being the purchaser, surely I am entitled to, and claim to have delivered to me a full list of the tenants of the water, with the amount which each tenant pays, and an account of the outgoings. I understand a payment is made to Mr. *Thomas Barraclough*. Pray what is that for? I am also informed that a considerable sum is owing to Mr. *W. Balme*, in respect of money expended by him upon the property, and for the repayment of which he has been and now is in receipt of the water rents. Now this is a charge upon the property which must be cleared off. But it strikes me the first thing for the vendor to do is, to furnish an abstract of his title to the water and water-works, which up to this date he has neglected to do, and until I receive it it will be impossible for me to lay the abstract already received before counsel to advise thereon."

After some further correspondence, the Defendant declined completing on the ground of the lots being copyhold tenure ; and moreover, as to lot 7, on account of misrepresentation as to the rent arising from the reservoir.

The

The Plaintiff then filed two claims for specific performance, supported by affidavits to the effect that the suits and services in respect of the copyhold hereditaments holden of the manor of *Wakefield*, whereof the lots in question were holden, were compounded for, and that the rents, fines, and heriots payable in respect thereof were fixed and certain, and were merely nominal; and that the mines and minerals, timber and other trees, in and growing upon the said hereditaments belonged to the copyhold tenants of the hereditaments, and that all the copyhold hereditaments holden of that manor, were considered and treated by the owners thereof as equal in value to freehold hereditaments; and that the description of these lots as freehold arose from mistake. It appeared that the Defendant was a solicitor, and had on some occasions acted on behalf of the Plaintiff, with reference to this property; and it was insisted, on the part of the Plaintiff, that the Defendant must consequently have known, or must be taken to have been aware of the circumstances affecting the property.

1852.  
 PRICE  
 v.  
 MACAULAY.

The Vice-Chancellor had made one decree for specific performance on both claims, and had directed that no more costs should be allowed than would have been allowed upon one claim.

Mr. *Willcock* and Mr. *Welch* were for the Plaintiff.

Mr. *Bethell* and Mr. *G. L. Russell*, for the Defendant.

The following cases were cited: *Trower v. Newcome* (a), *Brown v. Rawlins* (b), *Roe v. Vernon* (c).

THE LORD JUSTICE KNIGHT BRUCE.

The case divides itself into two branches: one as to lot

(a) 3 *Mer.* 704.

(b) 7 *East*, 409.

(c) 5 *East*, 51.



1852.  
 PRICE  
 v.  
 MACAULAY.

lot 6, the other as to lot 7. With regard to lot 6, the only point is as to the tenure, and from the evidence there appears strong reason to be satisfied that the difference in value between copyholds in this manor and freeholds, is very slight indeed. Perhaps, however, that would not be material for the Plaintiff, if we had been of opinion that there was anything wilful and designed in the representations, substantially made by the advertisements and posting bills, that the whole was freehold. By wilful representations, I mean representations made with a view to enhance the value. This was a part of the case which struck me as of importance, not only to the parties themselves, but to the agents concerned: and it is with great pleasure that we find ourselves able to exempt those gentlemen from all wrong intention; and probably it would not be too much to extend the same observation to the Plaintiff. The difference is so slight in point of value, the right to the timber and minerals being in the copyholder, that there could hardly have been a motive for misstatement. But if we had thought the representation made with wrong intention, it would probably have had considerable influence with us, notwithstanding the subsequent conduct of the Defendant. Considering, however, what the abstract stated, and the length of time during which the Defendant had had the abstract, when he wrote the letter of the 7th of *October*, we are of opinion with the decree as to lot 6, and think that it has dealt favourably with the Defendant, by allowing compensation for any difference of value arising from tenure.

We both think, perhaps not exactly on the same ground, but not much differing from one another, that the case is different with regard to lot 7. That lot is thus described. [His Lordship read the description.] The truth of the case was, and it must have been known

known to the Plaintiff personally, (whether known to the agents or not,) that the rent represented as 60*l.* per year was a rental obtained from certain houses, which were supplied with water from a reservoir. Now the houses did not immediately adjoin the property. Between them and the reservoir lay lands of two other proprietors, and the water only arrived at the houses which paid the rents, by means of pipes passing through the intervening lands of Mr. *Haigh* and Mr. *Barracclough*. It is not in proof that there was any title to the lands through which the pipes pass. The Plaintiff appears to be merely a tenant of the licence from year to year. This easement was essential to the enjoyment of the rental, and for it the Plaintiff paid annually 5*s.* to the one, and 10*s.* to the other proprietor. The advertisements and posting bills have not a word about this, but represent the rental of 60*l.* as incident to the property or part of the property. That, in my opinion, was a most serious and important misrepresentation concerning the property, calculated to produce an erroneous impression as to its nature and value. Here, again, I have pleasure in acquitting the legal and other agents concerned, of any wrong intention; and it is not necessary to impute any wrong intention to the Plaintiff. But Sir *William Grant* said, in *Burrows v. Lock* (a):—"The Plaintiff cannot dive into the secret recesses of his heart: so as to know, whether he did or did not recollect the fact; and it is no excuse to say he did not recollect it. At least, it was gross negligence to take upon him to aver, positively and distinctly, that *Cartwright* was entitled to the whole fund, without giving himself the trouble to recollect, whether the fact was so or not; without thinking upon the subject." Now, here in my view is an important fact untruly represented, the inaccuracy of which representation


1852.

PRICE

v.

MACAULAY.

(a) 10 *Ves.* 476.

1852.  
  
 PRICE  
 v.  
 MACAULAY.

ation was known to the person making it; a representation calculated to induce a belief of the value of the property, not warranted by its nature and circumstances. I do not impute wrong intention to any one; still, such a representation in the view of this Court must be considered a fraud, quite as much as was the case in *Lysney v. Selby* (a), and *Dobell v. Stevens* (b).

Supposing, however, that the Defendant had actually known, at the time of the purchase, what were the real state and condition of the subject-matter of the contract it may be that he would not be entitled to complain. But in order to enable a vendor to avail himself of that defence in such a case, he must show very clearly that the purchaser knew that to be untrue which was represented to him as true; for no man can be heard to say, that he is to be assumed not to have spoken the truth. Now the purchaser had been connected with the profession of the law, and professionally concerned for the vendor, who had also been in the profession of the law, and it is possible that the purchaser might have become acquainted with the real state of the case; but the evidence falls far short of convincing me of this. It is said, that subsequently he had such notice as might have led him to ascertain how the facts stood. That, however, is not sufficient in a case of misrepresentation; he must be shown clearly to have had information of the real state of the facts communicated to his mind. Here, again, there is no evidence inducing me to believe that he knew substantially the real state of this property, at any time after the purchase, while the correspondence was proceeding, by which he became bound to perform the contract, independently of extraneous matter vitiating it. It is said that as the abstract did not show a title to the easement it ought to have induced suspicion in the mind

(a) *Lord Raym.* 1118.

(b) 3 *B. & C.* 623.

**min**d of a careful man reading it. But that is not enough:  
**it** was the duty of the vendor to state that the water, by  
**means** of the pipes, could not reach the houses, except by  
**permission** of others who were paid for that permission,  
**and** might withdraw it. If, as to this point of notice,  
**the** case goes so high as suspicion, (of which I am not  
**sure**,) it is not carried high enough, in my judgment.

1852.  
PRICE  
v.  
MACAULAY.

It is said that by the third condition objections to the  
**title** were to be communicated within a given time, on  
**pain** of the purchaser being barred from sustaining them.  
**In** the first place, however, it is at least doubtful whether  
**the** condition applies where there has been wilful mis-  
**representation**,—a point on which I refer to *Stewart v.*  
*Alliston* (a). But in the next place, it is a misapprehen-  
**sion** to consider this a question of title. This representa-  
**tion** is not introduced into the contract; the auctioneer  
**did** not copy it. The contract ended with the quantities.  
**This** is a representation *ultra* the contract signed. It is  
**such** as was made in *Lysney v. Selby*, and *Dobell v.*  
*Stevens*; as far from the title as anything can be; a mis-  
representation vitiating the contract, unless the Court  
be satisfied that there has been a waiver after a clear  
notice of the fact. My opinion is, with the greatest  
deference to the Vice-Chancellor, that the claim as to  
lot 7 ought to have been dismissed. I feel less dif-  
ficulty in coming to this conclusion, since it is quite  
obvious that some facts were inaccurately stated to the  
Vice-Chancellor, although not designedly. I differ there-  
fore from him with less diffidence than I should other-  
wise feel in differing from such a judge and such a  
lawyer.

I think that the decree should stand as to lot 6, but  
that, as to lot 7, it should be dismissed with costs.

*The*

(a) 1 *Mer.* 26.

1852.

HUGHES *v.* MORRIS.

May 31.

June 1.

Before *The*  
LORDS JUSTICES.

**T**HIS was an appeal from a decision of Vice-Chancellor *Turner*, dismissing a claim for the specific performance of an agreement of the sale of shares in a ship. The case is reported, 9 *Hare*, 636, in the Court below, where, however, the ground of the decision was different from that upon which the case was decided upon appeal.

A contract for the sale of shares in a British vessel, not reciting the certificate of registry, cannot be enforced in equity.

On the 8th of *April* 1847, forty sixty-fourths of a ship called "*The Virtue*" were put up for sale by auction by the assignees of certain bankrupts who had traded under the firm of *Phillips & Co.*

The third condition of sale was as follows: "The purchaser shall pay to the auctioneer, immediately after the sale; a deposit after the rate of 10*l.* per cent. on the amount of his or her purchase-money, and sign an agreement for the payment of the remainder to the solicitor of the vendors, at his offices in *Newport* aforesaid, on the 30th *April* next or earlier, if the purchaser is prepared, when the purchase is to be completed and the possession of the vessel given up to the purchasers." The fourth condition of sale provided that the purchaser should be at the risk of the vessel and stores from the time of knocking down the hammer. The sixth condition was, that upon the payment of the remainder of the purchase-money, together with all other charges and dock and other dues, the purchaser should have a bill of sale of the assignee's interest in the forty sixty-fourths, together with the ship's stores, sails, and appurtenances enumerated in a schedule, but that the vendors should not be obliged to produce any documentary or other evidence of title whatsoever, other than and except the certificate

1852.  
 HUGHES  
 v.  
 MORRIS.


certificate of registry and the bill of sale from *Elizabeth Phillips* of *Newport* to the assignees of the bankrupt.

A Mr. *Edwards*, who was an agent for the Plaintiff, was at the auction declared the purchaser of the forty sixty-fourths for 375*l.*, and the following memorandum was signed by him and the agents of the vendors:—  
 “Memorandum of agreement between,” &c. “That the said *Henry Edwards* hath this day become the purchaser of the shares and premises comprised in the annexed particulars, and subject to the conditions of sale also annexed, at the price or sum of 375*l.*, and hath paid into the hands of *T. Phelps*, the vendors’ solicitor, the sum of 37*l.* 10*s.* as a deposit of 10*l.* per cent. upon the said purchase-money, and in part payment thereof. And the said *Henry Edwards* agrees to pay the remainder of the said purchase-money at the time and place mentioned in the said conditions, and upon payment thereof the said vendors will execute to the said *Henry Edwards* a transfer or bill of sale of the shares according to the said conditions. Dated this 8th day of *April* 1847.”

Disputes arose between the vendors and the purchaser, the result of which was, that the former declined completing the contract.

The Vice-Chancellor dismissed the claim, upon grounds depending upon the dealings between the parties, and independently of the Ship Registry Act. Upon the opening of the appeal, the Lords Justices requested the counsel to argue the case first with reference to the 34th section of the Act 8 & 9 *Vict.* c. 89, which provides, “that when and so often as the property in any ship or vessel, or any part thereof, belonging to any of her Majesty’s subjects, shall after registry thereof be sold to any other or others of her Majesty’s subjects, the same shall

**shall** be transferred by bill of sale or other instrument in **writing**, containing a recital of the certificate of registry of such ship or vessel, or the principal contents thereof, otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or in equity. **Provided** always, that no bill of sale shall be deemed void by reason of any error in such recital, or by the recital of any former certificate of registry instead of the existing certificate, provided the identity of the ship or vessel intended in the recital be effectually proved thereby."

1852.  
  
 HUGHES  
 v.  
 MORRIS.

The 37th section provides, that no bill of sale or other ~~instrument~~ in writing shall be valid and effectual to pass ~~the~~ property in any ship or vessel, or in any share thereof, or for any other purpose, until such bill of sale or other ~~instrument~~ in writing shall have been (where the ship ~~has~~ been registered) produced to the collector or controller of the port at which such ship or vessel is registered, nor until such collector and controller shall have ~~made~~ the prescribed entries in the book of registry.

In the present case, the ship was registered, but there ~~was~~ no bill of sale or other instrument in writing containing any recital of the certificate of registry, nor had ~~the~~ contract been produced to the collector or controller.

Sir *W. P. Wood* and Mr. *Collins*, for the Appellant.

The claim cannot be dismissed as being precluded by ~~the~~ 8 & 9 *Vict.* c. 89, without laying down generally the proposition that a British vessel cannot be sold by public auction. Now it is to be remarked, in the first place, that the present Act differs materially from the Acts on the subject which were in force before the 6 *Geo.* IV. c. 110 passed, and therefore that many of the cases which were decided under those former Acts would not be authorities in the existing state of the law. The 34 *Geo.* III. c. 68, s. 14, was as follows: "And whereas, by an Act

VOL. II.

A A

D. M. G. passed

1852.  
 {  
 HUGHES  
 v.  
 MORRIS.

passed in the 26th year of his Majesty's reign, intituled 'An Act for the further Increase and Encouragement of Shipping and Navigation,' it is, amongst other things, enacted, That when and so often as the property in any ship or vessel belonging to any of his Majesty's subjects shall be transferred to any other or others of his Majesty's subjects, in whole or in part, the certificate of the registry of such ship or vessel shall be truly and accurately recited in words at length in the bill or other instrument of sale thereof, and that otherwise such bill of sale shall be utterly null and void, to all intents and purposes. And whereas doubts have arisen whether, by the said provision, every transfer of property in any ship or vessel is required to be made by some bill or other instrument in writing, and whether contracts or agreements for the transfer of such property may not be made without any instrument in writing, be it enacted, That no transfer, contract, or agreement for transfer of property in any ship or vessel made or intended to be made after the 1st day of *January* 1795 shall be valid or effectual for any purpose whatsoever, either in law or in equity, unless such transfer, or contract, or agreement for transfer of property in such ship or vessel shall be made by bill of sale or instrument in writing, containing such recital as prescribed by the said recited Act." When the 6 *Geo.* IV. c. 110, was passed, an important alteration was made by the omission of the words "contracts and agreements." This omission was continued in the Act of *Will.* IV. and in the present Act, the provisions of which, therefore, seem not to have been intended to extend to mere contracts or agreements. The decisions in *Biddull v. Leeder* (a) and *Mortimer v. Fleeming* (b) showed the inconvenience arising from the former state of the law ; and the omission in the Act of *Geo.* IV., and the subsequent Acts, must be

(a) 1 *B. & C.* 327.

(b) 4 *B. & C.* 120.



1852.

**HUGHES**  
**v.**  
**MORRIS.**

be attributed to an alteration in the intention of the Legislature. In the last edition of Lord *Tenterden's* work, edited under his superintendence, that of 1827, the distinction is adverted to at page 50, thus: "Upon the subject of transfer of property it seems fit to notice a distinction between the recent and former statutes. A recital of the certificate of registry is not now made necessary to the validity of an executory contract or agreement for the transfer of property, as was expressly required by the 34 *Geo.* III. c. 68, s. 14; neither is an indorsement of such a contract on the certificate now required, which was held to be necessary under that statute; and, by the language of the new Act, if the certificate be not recited in the bill of sale, the transfer shall not be valid and effectual; whereas, by the 26 *Geo.* III. c. 60, s. 17, the bill of sale was made void."

It is one thing to say that there shall be no property in a ship without registration, and another to say that the Court cannot enforce a mere personal contract. We do not seek to have the property declared to be in the purchaser till after registration. We are only calling on the vendors to fulfil their agreement by obeying the requisitions of the statute, and making the purchaser the legal owner, as they are bound in conscience to do. The objects of the enactment are, first, that nothing may take place by which a foreigner may acquire a title to a British ship; and secondly, that alienations shall be so publicly made as to exclude all questions as to notice of prior dealings with the property. In *Ireland* there can be no title to land unless it is on the register, but that provision has never been held to exclude the equitable jurisdiction to enforce a specific performance. All that the Act now in force says, is that the property shall not pass without registration. It does not say, as the former Acts did,

A A 2

that

1852.  
 HUGHES  
 v.  
 MORRIS.

that any contract or agreement shall be ineffectual. The remedy *in personam* is not touched.

[*The LORD JUSTICE KNIGHT BRUCE.*—The 34th section contains the words “in equity.”]

But the 34th section does not apply to this case, for this is not a case of transfer. [They referred to and commented on *Pritchard v. Ovey* (a), *Kerrison v. Cole* (b), *Langton v. Horton* (c), *Davenport v. Whitmore* (d), *Follett v. Delany* (e), *Whitfield v. Parfitt* (f), *Ladbroke v. Lee* (g), *McQueen v. Farquhar* (h), *Mestaer v. Gillespie* (i), *Brewster v. Clarke* (k), *Ex parte Yallop* (l), *Curtis v. Perry* (m), *Malcolm v. Scott* (n), *McCalmont v. Rankin* (o).]

Mr. Rolt and Mr. Lewis, for the Respondents, were not called upon.

*The LORD JUSTICE KNIGHT BRUCE.*

The question before us turns upon the construction of the 34th section of the 8th & 9th of the Queen, c. 89, assisted, more or less, by the residue of the Act. It is a section differing, in phraseology at least, from the law upon the same portion of the subject as it had, at some time before, existed; a difference which has been plausibly contended to have a bearing upon the construction, and certainly is not to be disregarded entirely. It is clear that the Legislature considered itself as providing for that which was a matter of public policy,

(a) 1 *Jac. & W.* 396.  
 (b) 8 *East*, 231.  
 (c) 5 *Beav.* 9.  
 (d) 2 *Myl. & Cr.* 177.  
 (e) 2 *De G. & S.* 235.  
 (f) 15 *Jur.* 852.  
 (g) 4 *De G. & S.* 106.

(h) 11 *Ves.* 467.  
 (i) 11 *Ves.* 621.  
 (k) 2 *Mer.* 75.  
 (l) 15 *Ves.* 60.  
 (m) 6 *Ves.* 739.  
 (n) 3 *Hare*, 39.  
 (o) 8 *Hare*, 1.

policy, of general interest, when it thus provided [his Lordship read the 34th section.]

1852.

HUGHES


v.

MORRIS.

Now, this is the case of a part of a vessel belonging to some or one of the Queen's subjects, and registered, that has been sold to another of the Queen's subjects, in this sense, that it has been contracted to be sold by an agreement in writing; one of the provisions of the agreement being, that the purchaser shall be at the risk of the vessel and stores from the time of the knocking down of the hammer, which is a time either simultaneous in effect with the signature of the contract, or previous to it.

The contract does not to any extent, or in any manner, either accurate or inaccurate, recite the certificate of registry. It is said that this is of no importance, because the contract is not a bill of sale; and that although it is an instrument in writing, yet it does not effect a transfer. The distinction appears to me immaterial with regard to the equitable principles which are here called into action. What the Legislature had in view was not merely, as I apprehend, the passing or not passing of what we call the legal estate, but substantially this: that whenever property in a vessel should be changed, it should be changed in a particular way. Now, whether there is a sale, or a contract for a sale, can make no difference. A contract for a sale is, in the view of a Court of equity, a sale; whether an actual transfer is made is of no consequence, if a transfer is agreed to be made, because that which is agreed to be done is in the view of a Court of equity, for many purposes, held to be done. If the argument were to prevail that what this Act directs with respect to a sale or transfer, does not extend to a contract for sale, or a contract to transfer, we should in effect, as it seems

confirmed in the opinion I had formed when the matter was first mentioned. I confess, that until doubts were ingeniously raised in the argument, I never considered that the subject was involved in any difficulty. I had always thought it perfectly clear that under the present statute, as under the old statutes, there could be no transfer in equity that was not a transfer in law of the ship.

1852.  
  
 HUGHES  
 v.  
 MORRIS.

The only question is this, whether the law has been altered since the year 1816, when Lord *Eldon* decided the case of *Brewster v. Clarke* (a), because there Lord *Eldon* distinctly decided that there can be no bill for specific performance of the transfer of a ship upon a contract of sale. Such is the necessary result of that decision.

Has the law been altered in any way, so as to affect the principle upon which that decision went? Reliance is placed on the circumstance, that whereas originally the Legislature had said no transfer should be valid, a few years afterwards another act passed reciting that doubts had been entertained whether the former extended to contracts, and enacting that contracts and agreements for sale should be also void. The latter act was in force when *Brewster v. Clarke* was decided. But it is said, that since that case was decided, namely, first, by the statute of Geo. IV., when the navigation laws were consolidated, and subsequently by those of Will. IV., when they were again consolidated, and ultimately by the Act of the 8th & 9th of the Queen, when they were lastly consolidated, the provision as to agreements has been omitted. That is so; and Lord *Tenterden*, referring, no doubt, to several decisions at law that had taken place during the time when he was Chief Justice, shortly before the passing of the first Consolidation Act of Geo. IV.,

(a) 2 Mer. 75.

1852.  
 {  
 HUGHES  
 v.  
 MORRIS.

IV., says, that the alteration makes a difference, and that now contracts are not within the Act. This may be quite right. It may be that now an action may be maintained upon a contract for a sale of a ship, which would have been void before, under the laws as they were before they were consolidated in the reign of *Geo. IV.* That may be so; but what we have to consider is,—what is the effect of the recent enactment upon equitable considerations with regard to ships? I confess it seems to me that it leaves the matter exactly where it was before, because what the Act says is, “when and so often as the property in any ship” shall be sold. The language altogether in this statute is very inaccurate; the correct expression would be not “the property in any ship,” but “any ship.” The provision of the Act being that a transfer shall not be valid to any purpose whatsoever, the argument is, that a contract, although not valid to transfer the property, may make a party to it the owner in equity. That would be to get rid of the whole policy of the statute, which is (whether a sound policy or not, we need not inquire), that there should be the means of tracing from the original grand bill of sale, as it is called, the ownership for all time. But if the doctrine be right that is contended for, this need not appear in any document from the very first sale. In my opinion, even supposing the law to have been altered, the alteration would merely be with regard to the right of action, and not with reference to proceedings in equity.

Indeed, I am not clear that the remedy by action at law would not give complete relief. However that may be, I think that the present statute is the same in effect as the old statute in this respect, that it prevents any transfer in equity either by contract or otherwise, except in the mode prescribed.

*The*

*The* LORD JUSTICE KNIGHT BRUCE.

1852.

The Respondents will take the deposit, and no other costs. It will be understood that this is to be without prejudice to an action.

HUGHES  
v.  
MORRIS.

In the Matter of BARNARD, one &c. ;

June 30.

AND

In the Matter of 6 & 7 VICT. c. 73.

*Ex parte* WETHERELL.

THIS was the appeal of a solicitor of the Court from an order of the Master of the Rolls, directing the taxation of the Appellant's bill of costs, under the 6 & 7 Vict. c. 73, s. 37. The question turned upon the following proviso in that section:—"Provided always, that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill, after a verdict shall have been obtained, or a writ of inquiry executed in any action for the recovery of the demand of such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, or after the expiration of twelve months after such bill shall have been delivered, sent, or left as aforesaid, except under special circumstances, to be proved to the satisfaction

Before *The*  
LORDS JUSTICES.

In an action brought by an attorney against his client, upon his bill of costs, the client obtained an order for taxation on the terms of withdrawing all his pleas except *nunquam indebtedatus*. Afterwards he withdrew all his pleas, and applied to the

Judge for an order of taxation, under the 6 & 7 Vict. c. 73, which was refused for want of jurisdiction. *Held*, that the client could not obtain an order for taxation from the Court of Chancery, there being no special circumstance beyond mere overcharge.

*Semble*, that where judgment has been given in the attorney's action, the special jurisdiction given by the 6 & 7 Vict. c. 73, s. 37, does not exist.

Where special circumstances are relied upon as a ground for taxation after the prescribed time they must be such as the client could not have reasonably availed himself of sooner.

*Semble*, that mere overcharge is not a special circumstance within the meaning of the Act.

1852.  
  
*In re*  
 BARNARD.

satisfaction of the Court or Judge to whom the application for such reference shall be made.”

The facts are sufficiently stated in the judgment.

Mr. *Stuart* and Mr. *J. V. Prior*, in support of the appeal, cited *Meredith v. Gittins* (a), *Re Whicher* (b), *Megoe v. Megoe* (c), *Re Hair* (d).

Mr. *Lovell*, for the Respondent, cited *Re Gedye* (e).

*The* LORD JUSTICE KNIGHT BRUCE.

In this case Mr. *Barnard*, a solicitor and attorney, was employed by Mr. *Wetherell*, a clergyman, in various matters, including proceedings at law and in equity, a state of things which gave the client a right to have the bills taxed by means of an application to a Court of law or to this Court. The bills were delivered previously to *December* last, and an action of debt was brought on them; whereupon the client (the Defendant) obtained an order from one of the Judges of the Court of law in which the action was brought, to tax the bills; but afterwards, on an application by the Plaintiff to the Judge, an order was made that the summons to tax should be dismissed with costs, unless within a week the Defendant should consent to withdraw all his pleas except “never indebted,” and in that case all the bills were ordered to be taxed, with the costs of the application. We are informed that he accordingly did withdraw all his pleas except “never indebted.” The client, in consequence, remained in possession of the order to tax the bills from the Court in which the action was brought, and

(a) 19 *Law T.* 29.

(b) 13 *M. & W.* 549.

(c) 2 *C. P. Cooper*, 213.

(d) 10 *Beav.* 187.

(e) 14 *Beav.* 56.

**and** which was a Court of proper jurisdiction for the **purpose**. But the client, instead of proceeding with **the** taxation, thought it better to withdraw his only **remaining** plea in the action, whereupon this order was **made**:—"On hearing the attorneys, agents, and **counsel** on both sides, and by consent, I do order that the **Defendant** be at liberty to withdraw the plea herein **mentioned**;" whereupon the plea was withdrawn, the **necessary** consequence of which was, that the Plaintiff **was** entitled to sign judgment in the action of debt. **The** judgment was accordingly completed, and was final.

1852.  
In re  
BARNARD.

**Afterwards**, the client again applied to a Court of **common** law for taxation, which he might have had **before**, and from which he had in effect receded. The **application** was refused with costs, by a Judge at **chambers**. From this refusal the client had a right of appeal **to** the full Court. Instead of taking that course, he **presented** a special petition to tax to this Court, which, **at least** originally, had equal jurisdiction with the Court **of** law for the purpose.

**Now**, the first question raised is one of importance; **namely**, the question whether the jurisdiction having **been** equally in this Court and the Court of law, and **the** latter having been first applied to, this Court has **any** power to deal with the matter. I think that this question cannot be affected by the ground of decision **at** law, which was, it is said, the want of jurisdiction.

But independently of the objection as to jurisdiction, **and** upon the assumption that it does not bar an **ap**plication here, the next question is, whether the **applica**-tion is one which can be supported without special **cir**-cumstances. I am of opinion that it is an application which can only be supported by special circumstances.



1852.

*In re*  
BARNARD.

It is true that the letter of the Act of Parliament only mentions the cases of a verdict having been obtained, and of the execution of a writ of inquiry, and that the judgment in the present case was obtained in an action in which there has been no writ of inquiry, and in which there was no verdict. But whatever the letter of the statute may be, I am of opinion that it will not exceed the bounds of just interpretation to hold, that, according to its spirit, the enactment includes this case, although there has been neither verdict nor writ of inquiry. There has been more than either. Without special circumstances there can be no taxation; at least in my judgment.

Now in the present instance there is no special circumstance, except as I shall mention. And first as to the complaint with respect to fees of counsel charged and not paid. If no explanation had been given, this would be a serious matter, not ending with the question of taxation, but one which might have placed the professional position of the attorney in danger. Here, however, there appears to have been an absence of dishonesty; it was understood between the client and the attorney that the attorney was not to advance the money to pay the fees to counsel, who, personally acquainted with the client, had agreed that the fees might be charged without being paid; the understanding was, that when paid, they should be paid to counsel. Another irregularity is the insertion of charges for business not done. It would have been better if in this, as in all cases, the bill of costs had exhibited the transaction as it really was. But here also there appears on the evidence to have been an absence of bad intention. I collect that the attorney not only did not intend to make any improper representation, but has not charged more than he was fairly entitled to charge. The only other point is, as to the

the alleged multiplication of charges for attendances; but on looking through the bills, and judging, as far as we can from the materials before us, of the history and nature of the business done for this client, although there are in some instances several charges for attendances in the course of the same day, we believe that the attorney did not charge too much, and if he had, it is not clear that a mere overcharge can, in the absence of fraud, amount to a special circumstance. Respectfully differing from the judgment which has been given, I think that there should be no taxation. If the petition had been originally brought before me, I should have dismissed it with costs.

1852.  
In re  
BARNARD.

*The LORD JUSTICE LORD CRANWORTH.*

I have arrived at exactly the same result. The first point is of great importance. I confess that the case would present a perfect anomaly in our law, if the client, after having made his choice of proceeding in one of two tribunals of co-ordinate jurisdiction, before which he is defeated, were at liberty to apply to the other. On a mere suggestion that a party is proceeding at law and equity for the same matter, it is of course to stop one proceeding. It is true that there are cases in which an application which has been refused in one Court, may be made to another. But these are exceptional cases. One instance occurred in the case of *Gorham v. The Bishop of Exeter* (a), where a rule was refused by the Courts of Queen's Bench and Common Pleas, and was granted by the Exchequer, when I had the honour of being a Judge of that Court. It was the first Court which granted the rule *nisi* (b). So with regard to the well-known case of the Canadian prisoners, upon the return of the *habeas corpus* the prisoners were remanded by one Court, and an application was made to another

(a) 15 Q. B. 52.

(b) 5 Exch. 630.

1852.

*In re*  
BARNARD.

another (a). However, the writ of *habeas corpus* differs from all other writs, as being in favour of the liberty of the subject. Nor do cases where *ex parte* applications for an order are made, under the Imprisonment for Debt Act, to one Court after they have been refused by another afford any analogy to the present.

If it had been necessary to decide the question, I believe that I should have come to the conclusion that we have no jurisdiction. It would make no difference in my mind if the order of the Judge had been wrong, as it is contended. The way to set it right was to apply to the full Court. There is no principle which would give this Court jurisdiction in such a case, without at the same time giving to a person dissatisfied with the order of the Lord Chancellor a right to appeal to a common law Judge, and making Courts of co-ordinate jurisdiction appellate tribunals from one another. I think that this alone would be a sufficient objection to the order. I go further than my learned brother as to the effect of the judgment. I not only think such a case within the spirit of the Act, but I doubt whether the Act meant to leave any jurisdiction after judgment. I do not say that there is no remedy, but I think there is none under the statute. The Act says: "after a verdict shall have been obtained, or a writ of inquiry executed;" saying nothing about judgment, and leaving it to be inferred that after judgment no application could be made.

Still if all these points were decided contrary to the view which I have taken, there are no special circumstances in this case. If application is made on the ground

(a) *Leonard Watson's case*, 9 *Ad. & El.* 808; *Canadian Prisoners' case*, 5 *M. & W.* 32.

**ground** of special circumstances, after the lapse of the **prescribed** time, the circumstances must be such as to **afford** a reasonable excuse for not applying sooner, not **circumstances** of which the client could reasonably have **availed** himself before.

1852.

*In re*  
**BARNARD.**

I see another great objection to the taxation, which is **this**: It is a well-known rule in Courts of common **law**, that after an action has been brought, and there is **an** application to tax, the costs of taxation are costs in **the** cause. The rule under the Act, however, is, that if **upon** taxation more than one-sixth is struck off, the **costs** would fall on the Respondent. I think that a **person** having failed in a proceeding in which he would have had to pay the costs of taxation, should not be at **liberty** to take another proceeding by way of appeal, in **which**, if successful in taxing off one-sixth of the costs, he would throw the costs of taxation on his opponent. I concur in thinking that the order at the Rolls must be reversed, and that the petition must be dismissed with costs.

*The* LORD JUSTICE KNIGHT BRUCE.

I wish to add, that I do not mean to intimate a different opinion upon the effect of the 37th section of the Act, from that which has been expressed by my learned brother. I merely abstain from giving any opinion upon the point.

1852.

May 31.  
June 1.

In the Matter of the ST. GEORGE'S STEAM  
PACKET COMPANY, and of the JOINT-STOCK  
COMPANIES WINDING-UP ACTS, 1848 and  
1849.

### HAMER'S DEVISEES' CASE.

Before the  
Lord Chan-  
cellor LORD  
ST. LEON-  
ARDS.

A testator devised and bequeathed all his real and personal estate, the latter consisting of, among other things, shares in a joint-stock Company, to his widow for life, and after her death, to his daughter absolutely; and he appointed them executrixes. The widow and daughter, as executrixes, received the dividends on the shares for several years. After the death of the widow, the Company was wound up under the Winding-up Acts: *Held*, that the daughter was rightly placed on the list of contributories in respect of her being devisee.

THIS was an appeal motion on behalf of the Office Manager of the above Company, from an order of the Vice-Chancellor *Knight Bruce*, overruling the judgment of the Master, and holding that the devisees of a deceased member ought not, in that capacity, to have been placed on the list of contributories.

*James Hamer*, a shareholder in the above Company, devised and bequeathed his real and personal estate, the latter including twenty-five shares in the Company, to his wife for life, and after her death to his daughter *Everalda*, the wife of *Joshua Rawdon*, absolutely, and he appointed his wife and daughter his executrixes. After the death of the testator, *Everalda Rawdon* received the first dividend in 1839, and paid it to her mother, who received the dividends until 1841, after which the Company paid no more dividends. The names of the testator's widow and daughter *Everalda Rawdon* were entered in the Company's books as executrixes only. The widow died in *April* 1850. An order having been made for the winding up of the Company, the Master on the 5th *June*, 1850, directed a call of

The Act 3 & 4 *Will.* IV. c. 104, charges the real estate of any person dying seised of such estate, not only with his debts of every description actually due at his death, but also with all liabilities which may result out of obligations entered into by him during his life.

1852.

HAMER'S DE-  
VISEES' CASE.

of 100*l.* per share on each of the twenty-five shares to be made upon *Joshua* and *Everalda Rawdon*, and such call was made payable out of the personal estate of *James Hamer*. *Joshua* and *Everalda Rawdon* appealed from that decision, which was affirmed by the Vice-Chancellor *Knight Bruce* on the 4th *July* 1850. A further call of 35*l.* per share was made upon *Joshua* and *Everalda Rawdon*, but only, as in the former instance, in their representative character. It appearing that there were not any personal assets of *James Hamer* in their hands, the Official Manager sought to place them on the list of contributories, in respect of *Everalda Rawdon* being the devisee of *James Hamer*. It was admitted that the debts in respect of which the devised estates were sought to be affected were incurred after the death of the testator. The Master being of opinion that the testator's real estate at his death was, under the Act 3 & 4 *Will.* [V. c. 104, contingently liable to debts which might be incurred during the term for which the partnership was formed, held that *Joshua Rawdon* and *Everalda* his wife, in respect of her being devisee, ought to be included in the list of contributories. On appeal by *Joshua Rawdon* and *Everalda* his wife to the Vice-Chancellor *Knight Bruce*, on the 1st *April* 1851, his Honor reversed the Master's decision, and excluded the names of *Joshua Rawdon* and *Everalda* his wife from the list of contributories, in respect of *Everalda Rawdon* being devisee. The case is fully reported in the third volume of Messrs. *De Gex & Smale's Reports*, p. 279, both on the point as to whether the call was rightly made on *Joshua Rawdon* and *Everalda* his wife in their representative character, as also on the point which alone forms the subject of the present appeal. It will be sufficient for the purposes of this report to state, that the deed of partnership provided for its continuance for ninety-nine years, and that the property of the Company should

1852.  
  
 HAMER'S DE-  
 VISORS' CASE.

be deemed personal estate ; and that, by the 20th clause it was provided, that before the executor, administrator, or legatee of a deceased proprietor should transfer any share vested in him in such capacity, or should become a proprietor in respect of such shares, or receive any dividends in respect of the same, he should leave for inspection, at the office of the Company in *Liverpool*, the probate of the will or the letters of administration under which he claimed to be entitled to the shares ; and that, by the 21st clause it was provided, that every person who, being the husband of any female proprietor, or the executor, administrator, or legatee of any deceased proprietor, should not, at the time of any shares vesting in him in such capacity, be a recognized proprietor in the Company in respect of any other shares in the capital, should, as to all duties, obligations, claims, and demands upon or against him in respect of such shares, be considered a proprietor from the time of the shares becoming vested in him as aforesaid.

Mr. *Bacon*, Mr. *Rolt*, and Mr. *J. V. Prior*, in support of the appeal.

We submit, that inasmuch as the personal estate of the testator, which was the primary fund for the discharge of his debts, is exhausted, the real estates devised are liable to make good his liabilities. It is clearly established by the authority of *Bermingham v. Burke* (a), that where a covenant into which a party has entered is broken after his death, his personal estate remains liable. By the Act 3 & 4 *Will.* IV. c. 104, real estate is made assets, and as such equally liable as personal estate for debts ; and the word "debts" involves the consequences of a breach of covenant, so that damages recovered after a testator's death, in an action of covenant

(a) 2 *Jones & Lat.* 699.

ant, constitute a debt payable out of his real estate,  
*Morse v. Tucker* (a).

1852.

HAMER'S DE-  
VISEES' CASE.

Mr. Bethell, Mr. Malins, and Mr. H. Humphreys, in  
support of the decision of the Vice-Chancellor.

It being admitted that the executrixes received dividends, it must be assumed that according to the provisions of the deed the directors of the Company treated and accepted the executrixes as proprietors; it would be most inequitable, therefore, to admit the assertion of such rights as are now claimed by the Official Manager against the devisee, who in that character has never participated in the profits of the Company. In the present case there was in fact no debt to which the estate of the testator was liable at the date of his death, under the Act 3 Will. & M. c. 14, *Wilson v. Knubley* (b). It has also been decided, under the subsequent statutes of 1 Will. IV. c. 47, and 3 & 4 Will. IV. c. 104, that devisees are not liable at law in respect of any debts which become payable by reason of any breaches subsequent to the death of the deviser, *Farley v. Briant* (c). The validity of our contention may be tested by the fact, that such a contingent liability could never have been given in evidence by an executor in support of a plea of *plene administravit* to an action by a simple contract creditor; nor could this Company have brought in a claim in respect of such a contingent liability under a decree for the administration of the testator's estate; nor could devisees have insisted on suspending the distribution of the personal estate, on the ground of such an impending liability as the present; nor, under the bankrupt law, could such a contingent liability be proved, *The South Staffordshire Railway Company v. Burnside* (d). The cases of *Morse v. Tucker*

(a) 5 Hare, 79.

(c) 3 A. & E. 839.

(b) 7 East, 128.

(d) 5 Exch. Rep. 129.



## CASES IN CHANCERY.

*Tucker* (a) and *Birmingham v. Burke* (b) are not applicable to the present, because in those cases the debts were expressly charged by the will; in the present, however, it is a statutable charge, the Act prescribing a remedy and defining the mode of procedure, which has received an interpretation that excludes contingent liabilities. The fallacy lies in attributing to contingent liabilities the same meaning as the word debts, which, although a consequence of obligation, do not necessarily result from every obligation. There is no authority for the enlarged construction here sought to be placed on the Act 8 & 4 Will. IV. c. 104, but the plain meaning of the enactment is such as leads to a restricted construction; for by the Act only the same remedies are given with respect to lands not charged with the payment of debts as existed before against heirs or devisees, "at the suit of creditors by specialty, in which the heirs were bound;" but in the present case the heirs of the parties to the deed were not bound. The object of the Winding-up Acts was not to increase liability, but simply to effect an equitable contribution between all parties liable as *inter se*. It is quite clear that until the personal estate of a deceased member is proved to be exhausted, the real estate cannot be affected.

Mr. Bacon, in reply.

It is a most unreasonable construction, which would make the word "debts" in the statute, have a more restricted sense than the words have received in a will. *Doyles' case* (c), under which the Master acted as to this Company, clearly shows that the mere receipt of dividends by executors will not render them liable to be placed on the list of contributories otherwise than in their representative

(a) 5 Hare, 79.

(b) 2 Jones & Lat. 699.

(c) 2 Hall & T. 221.

representative characters : in this case the personal estate of the testator is confessedly exhausted.

1852.

HAMER'S DE-  
VISEES' CASE.

*The LORD CHANCELLOR.*

*June 1.*

The Official Manager here seeks to charge the real estate of a testator in the hands of his devisees, after the lapse of several years, with the liability to make good certain losses which have been sustained by the Company since the death of the testator. It may undoubtedly be very hard to compel devisees under the circumstances of this case to satisfy these losses ; but if the testator's real estate is legally liable, this Court cannot do otherwise than give effect to such liability. It appears that the executrixes as such received the dividends upon the shares, from the time of the testator's death until the insolvency of the Company ; and it has been contended, that by the provisions of the deed the executrixes thus became the proprietors of the shares ; it has, however, been decided in *Doyles' case (a)*, that the mere receipt of dividends by executors, in their representative character, does not saddle them with any personal liability ; and although this point may not be altogether free from doubt, I have no desire to disturb that decision.

The question before me must be determined by reference to the deed under which the Company was constituted. By the provisions of that deed, though the contract of each member was under seal, yet the covenant was only a specialty debt where the heir was not bound, and consequently the real estate of a deceased member was not thereby affected ; whether under such circumstances the devisees could have taken any, and what steps, for the relief of the real estate, I am not called upon to say, but it is clear that no such application

(a) 2 Hall & T. 221.

1852.  
HAMER'S DE-  
VISEES' CASE.

cation was made: unless, therefore, such real estate is rendered liable by the Act 3 & 4 *Will.* IV. c. 104, the claim of the Official Manager in the present case against the devisees cannot be sustained. The statutes of *Will. & M.* and 1 *Will.* IV., which have been referred to during the argument, do not appear to me to bear on the point, the question before me being simply whether the claim is within the provisions of 3 & 4 *Will.* IV. c. 104. That statute is somewhat ambiguously framed; but its true construction, in my opinion, is such as to comprehend debts of every description, as charges on real estate, whether so charged by will or not. Undoubtedly there is that expression in the enacting part of that Act, which might be susceptible of the restricted construction sought to be put upon it by the counsel for the Respondents; but I think that such a construction is entirely displaced by the proviso which has not been referred to, "that in the administration of assets by Courts of equity, under and by virtue of this Act, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them, before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands." Thus, therefore, the Act, in establishing a priority of payment in favour of creditors by specialty in which the heirs are bound, before the payment of specialty or simple contract debts where the heirs are not bound, necessarily recognises the payment of such specialty and simple contract debts out of the real estate, which was not previously subject to the satisfaction of such debts. It is also to be observed, that the Act is not applicable to cases where there has been a devise charged with or subject to the payment of debts; and the question then arises, for what purpose was the Act passed. In my opinion, the object of the Legislature, and of the Act, was to create a charge  
of

**of** debts on real estate, where no such charge had been **made** by will, and I do not think that such charge **was** intended to be restricted only to those debts by **specialty** where the heirs were bound. Now, it having **been** decided that when a testator has charged his real **estate** with the payment of debts generally, future **debts** arising out of a previous liability are included, **and** the object of the Act being to supply the **omission** of an express charge by a testator, the present **claim**, supported as it is by the cases of *Morse v. Tucker* (a), and *Birmingham v. Burke* (b), appears to me **to fall** within the operation of that statute. That being **so**, and there being nothing either in the deed of **settlement**, or in the conduct of the parties, inconsistent with **the** claim of the Official Manager, I am clearly of **opinion** that such claim must be allowed.

1852.  
HAMEE'S DE-  
VISEES' CASE.

It was argued, that the real estate could only be reached in the same way as if the claim were preferred in an administration suit, and that too not before the personal estate had been exhausted; but I have nothing to do with that question. The question before me is simply whether these devisees, as such, are liable in any event to be placed on the list of contributories; and being of opinion that they are so liable, and that they were rightly placed on the list of contributories by the Master, the judgment of the Vice-Chancellor must be overruled.

(a) 5 *Hare*, 79.

(b) 2 *Jones & Lat.* 699.

---

1852.

July 7. In the Matter of the RUGBY, WARWICK, AND WORCESTER RAILWAY COMPANY, and of the JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849.

## PREECE AND EVANS'S CASE.

Before the  
Lord Chan-  
cellor, LORD  
ST. LEON-  
ARDS.

The subscrib-  
ers' agree-  
ment of an  
intended rail-  
way Com-  
pany provid-  
ed that the  
committee of  
management  
might dis-  
solve and  
wind up the  
affairs of the  
Company  
at any time  
before the  
Act of Incor-  
poration was  
obtained;  
under

these powers

the committee of management dissolved the Company, and proposed to return to each scripholder a certain amount of the deposit. Before such amount was received by any scripholder, he had to sign an assent to the cancellation of his scrip, and he became entitled to receive such further sum as the committee of management might declare payable after a final settlement of all claims upon the Company. The Company being subsequently wound up under the Winding-up Acts, a list of contributories, divided into several classes, was settled, and a call was made for the costs incurred in the winding up: *Held*, that the Master was not justified in making the call exclusively on that class of the contributories which included those scripholders who had received back part of the deposit, but that such class being entitled to participate in any further sum which might be declared payable, was liable, *pari passu*, with all the other contributories, to the call made to discharge the expenses incidental to the winding up.

THIS was the renewal of a motion which had been refused by the Vice-Chancellor *Knight Bruce* on the 1st *May* 1852, on behalf of Messrs. *Preece & Evans*, to discharge an order of the Master, whereby they were included in Class No. 6 of the list of contributories of the above Company, and ordered to pay a call of 4s. per share under the following circumstances:—The *Rugby, Warwick, and Worcester* Railway was projected in 1845, but early in 1846 the scheme became abortive. The subscribers' agreement provided, that "the deposit of two guineas per share should be paid by each subscriber at the time of subscribing; but no further deposit or sum shall be called for on account of expenses or otherwise, unless or until the proposed Act or Acts of Parliament shall be obtained, except only to the extent agreed by the standing order."

The

The deed also contained a proviso, "that the directors or committee of management should have full power at any time before any Act should be obtained, and of the sole authority in their sole discretion, to dissolve the Company by a resolution for that purpose by the directors, and to wind up or adjust the business transactions, liabilities, and affairs of or connected with the undertaking, and generally, and for the purposes of the undertaking, and also for the purpose of determining the same and winding up the affairs thereof, to represent and be competent to act on behalf of, and to bind all the subscribers thereto."

1852.  
PENCE &  
EVANS'S  
CASE.

In June 1846, the directors announced that they would return 15s. a share to the holders of scrip, upon their agreeing to the cancellation of their shares in the following form:—"I, A. B., being entitled to — shares in the Rugby, Warwick, and Worcester Railway Company, the scrip of which is herewith sent, hereby assent to the cancellation of the said shares, and to receive back the sum of 15s. on each of such shares, and such further sum as the committee of management shall declare payable after the final settlement of all claims upon the Company and directors, in full of all my share and interest in the said undertaking."

The sum of 2l. 2s. had been paid upon allotment of the shares. On 27th July 1846 the Company was formally dissolved by the directors, in pursuance of the powers of the subscribers' agreement. On the 1st June 1849 the order for winding up the affairs of the Company was made. The following list of contributories was carried in by the official manager before the Master, and was arranged under eleven different classes:—Class No. 1. List of contributories, being shareholders, who have paid deposit and signed deeds.—Class No. 2. List of contributories,

1852.  
 PREECE &  
 EVANS'S  
 CASE.

contributories, being shareholders, who have paid deposit and not signed deeds.—Class No. 8. List of allottees who have applied for shares, and to whom they have been allotted, but who have neither paid deposit nor signed deeds. This last class was disallowed by the Master, and therefore Classes Nos. 1 and 2 contained the entire of the original members of or subscribers to the Company.—Class No. 4. Original allottees who had not parted with shares, and delivered them up on receiving 15*s.* per share from the directors.—Class No. 5. Original allottees, who had not signed, but who have received the 15*s.*—Class No. 6. Transferees of shares, for which the original allottees have signed the deed. Class No. 7.—Transferees of shares, for which the original allottees have not signed the deed.—Class No. 8. Persons who have signed the deed, and not received back the 15*s.*—Class No. 9. Persons who had not signed the deed, nor received back the 15*s.*—Class No. 10. Provisional directors who have signed the deed, and who paid the deposit.—Class No. 11. Provisional directors, who have neither signed the deed nor paid the deposit.

The Master had ordered that a call of 4*s.* per share should be made upon all contributories in Lists or Classes 4 and 6, being the contributories to whom 15*s.* per share were paid or returned, and all such other contributories in Lists or Classes of contributories numbered 1 and 2, as were not included in Lists or Classes 4 and 6, who had neither transferred their shares, nor received nor been paid 15*s.* per share; and it was ordered that each of such contributories, before the 28th *April* 1851, should pay to the Official Manager 4*s.* per share on the balance, if any, which should be due from him, after debiting his account in the Company's books with such call.

No

No debts had been proved against the Company, but **the** claims of creditors were allowed as claims only by the **Master**. No costs had been taxed or ascertained, but **the** Master, considering that the call to be made should **be** confined to the discharge of the necessary expenses **of** the winding up of the Company, came to the **con-**  
**clusion** that 2000*l.* would be required for that purpose, **and** on the 28th *March* 1851, sanctioned the call in the **terms** above set forth.

1852.  
PREECE &  
EVANS'S  
CASE.

The following was the form of the account, as **ab-**  
**stracted** from the ledger, forwarded to each contributory **who** had received 15*s.* per share.

*A. B.*, Contributory for 20 Shares, signed Deed No. 4.

| <i>Dr.</i>                         | £   | s. | d. | <i>Cr.</i>                | £   | s. | d. |
|------------------------------------|-----|----|----|---------------------------|-----|----|----|
| To Scrip issued, 20                | 42  | 0  | 0  | By Deposit paid .         | 42  | 0  | 0  |
| Shares, at 2 <i>l.</i> 2 <i>s.</i> |     |    |    | By Directors, Dis-        | 15  | 0  | 0  |
| per Share . .                      |     |    |    | tribution of 15 <i>s.</i> |     |    |    |
| To Cash, 15 <i>s.</i> per          | 15  | 0  | 0  |                           |     |    |    |
| share                              |     |    |    |                           |     |    |    |
|                                    |     |    |    |                           | £57 | 0  | 0  |
|                                    | £57 | 0  | 0  |                           |     |    |    |

1851, *March* 28. To Master's first call on 20 Shares, at 4*s.*  
per Share, £4.

The following was the form to those that had not  
received 15*s.* per share :—

*A. B.*, Contributory for 20 Shares, signed Deed No. 1.

| <i>Dr.</i>                         | £   | s. | d. | <i>Cr.</i>                | £   | s. | d. |
|------------------------------------|-----|----|----|---------------------------|-----|----|----|
| To Scrip issued, 20                | 42  | 0  | 0  | By Deposit paid .         | 42  | 0  | 0  |
| Shares, at 2 <i>l.</i> 2 <i>s.</i> |     |    |    | By Directors, Dis-        | 15  | 0  | 0  |
| per Share . .                      |     |    |    | tribution of 15 <i>s.</i> |     |    |    |
| To Master's First                  | 4   | 0  | 0  | per share . .             |     |    |    |
| Call of 4 <i>s.</i> per            |     |    |    |                           |     |    |    |
| Share . . . .                      |     |    |    |                           | £57 | 0  | 0  |
| Balance . . . .                    | 11  | 0  | 0  |                           |     |    |    |
|                                    | £57 | 0  | 0  |                           |     |    |    |

The



1852.  
 PREECE &  
 EVANS'S  
 CASE.

The Vice-Chancellor was of opinion that the Master had jurisdiction to make the order, and had exercised his right discretion in making the call exclusively on the classes of persons who had received back part of the deposit, and he refused the motion with costs. From that decision Messrs. *Preece & Evans* now appealed to the Lord Chancellor.

Mr. *Russell*, Mr. *Winstanley*, and Mr. *Field*, in support of the appeal.

The call is not for a definite sum, and is in substance a call upon those scripholders who have received the 15s. per share; but they have nothing to do with the Company, which was formally dissolved by the directors under the powers of the deed. We submit that, by the 83rd section of the Act 11 & 12 *Vict.* c. 45, the Official Manager has power to make calls only on those who are, at law or in equity, liable to pay such calls. It is clearly established that there is no legal liability in such a case as the present, and it is for the Official Manager to show on what principle of equity such a liability as he has imposed can attach. No debt has been proved; there may have been a computation of the losses sustained by the contributories in the matter of this winding up, but, in order to justify the making of a call, there must be shown to be a substantial purpose for which such call is made, *Ex parte Hunter* (a).

Mr. *Swanston* and Mr. *Daniel*, for the Official Manager, in support of the Vice-Chancellor's decision.

In *Gay's case* (b), a prospective order for costs was made, and that case was affirmed on appeal to the Lord Justices. —

(a) 1 *Sim.*, N. S. 435.

(b) 5 *De G. & S.* 122; *S. C.*, 1 *De G. Mac. & G.* 347.

**J**ustices. It cannot be maintained that these Appellants had unconditionally retired from the Company, or that it was absolutely dissolved, as the right to participate in any surplus assets of the Company that might be realized was specially reserved, and having these rights they are justly liable to contribute towards the expenses of realizing such surplus.

1852.  
PREECE &  
EVANS'S  
CASE.

[*The LORD CHANCELLOR.*—There is nothing to show that these parties have received more than they were entitled to. If the directors were justified in paying the 15s., I can see no equity to get it back. There is no power under the Winding-up Acts to undo what the directors have done. As between the Appellants and the rest of the Company there was no liability; they had a contingent interest, and in respect of that they might have been placed on the list to receive, but that circumstance could confer no authority on the Official Manager to claim back the 15s. as a sum for which they were to account. A very serious question might have arisen if more than 2l. 2s. had been expended, as then every individual liability would have had to be investigated.]

In order to have made the proposal of the directors binding on the members of the Company generally, it should have been assented to by all the members. The Master has correctly proceeded on the ground that certain classes of contributories have received more out of the assets of the Company than the other classes, and we submit that those who have received more than they were entitled to, ought to disgorge, under the analogous equity of compelling legatees to refund.

Mr. Russell, in reply.

Gay's

1852.  
 PREECE &  
 EVANS'S  
 CASE.

*Gay's case* (a) is in our favour, for there the party had executed the deed, and was bound by the covenants; but in the present case there are no mutual rights or obligations between the Appellants, who have not executed the deed, and the other scripholders who did not avail themselves of the offer of the directors, and there is no reason or ground for the assertion that all the members must have concurred in the acceptance of the offer to make it availing.

*The LORD CHANCELLOR.*

The law has been much altered since this case was first decided, so that the Master may well have decided as he did, with reference to the then existing state of authorities, in placing the Appellants on the list of contributories.

The Appellants are buyers of scrip shares, and the persons from whom they bought were subscribers; buying those shares they must be considered as bound by the provisions of the instrument regulating the formation of the Company, and that particularly provides that each party should pay 2*l.* 2*s.*, and should not be under any further liability for calls until the proposed Act of Parliament should be obtained. There is also an express provision that the directors, in the event of the failure of the scheme, should be empowered to dissolve the Company and wind up its affairs before the Act should be obtained. The Company having failed to obtain its Act, the directors issued a circular to the effect that they would return 15*s.* a share, and the scripholders had to sign a paper assenting to the cancellation of their scrip on receiving back the 15*s.* and such further sum as might be forthcoming. Then  
 the

(a) 5 *De G. & S.* 122; *S. C.*, 1 *De G. Mac. & G.* 347.

~~the~~ secretary issued the certificates, which the persons ~~who~~ had accepted the proposed payment were obliged to ~~sign~~. The Appellants accepted the sum proffered, and ~~there~~ can be no doubt that the act done was such as to ~~be~~ within the powers of, and binding on, all parties. The effect of such a dealing was to exclude the scripholders ~~who~~ signed the certificate from all interference in the affairs of the Company; they were entitled only to whatever the committee of management might declare payable after the final settlement of all claims upon the Company and directors, but in that respect they had no power to interfere in the administration of the affairs; they had abandoned their general right to have regular accounts taken. If the matter had remained in that state, no question could have arisen between the Appellants and the Company; whether creditors could have come upon the whole body of scripholders would have depended on different circumstances, as, for instance, whether the conduct of each individual scripholder had amounted to a contract; but on this I give no opinion. *Upfill's case* (a) was no longer a binding authority, as the House of Lords has decided in the subsequent case of *Bright v. Hutton* (b), which was a much stronger case, for there, there had been an acceptance of shares and payment of deposit, and it was held that these facts did not constitute a liability to creditors.

1852.  
PREECE &  
EVANS'S  
CASE.

Then, with respect to the Winding-up Acts. It is to be observed, that though the last of these Acts includes the case of abortive Companies, it creates no new legal or equitable liability. Unhappily, however, the operation of these Acts has led to a vast expenditure, which must fall on the persons bound in any manner to contribute. These costs have been incurred in the winding

(a) 2 H. L. Ca. 674.

(b) 3 H. L. Ca. 341.

1852.  
 PREECE &  
 EVANS'S  
 CASE.

winding up of this Company. The question, then, being whether the Appellants are liable to contribute to these costs, I am of opinion that they are so liable because they have reserved to themselves a right to receive further sum from the directors, and these costs have been incurred in obtaining the assets in which, if recovered, these Appellants would be entitled to participate. So far, then, I think they were properly placed on the list of contributories. In the present instance, however, the Master has decided, and that decision has been affirmed by the Vice-Chancellor, that the Appellants are not only contributories generally, but exclusively, in respect of the 15s. which they have received out of the assets, and that they must pay that sum before any other scripholder who has not received that sum can be called upon to pay anything. I am of opinion that the Official Manager, as representing the general body of the Company, had not the slightest right to call upon any of those members who had accepted the 15s. to refund that sum. There was clearly no such right at law, nor there any in equity.

The case of legatees being called on to refund in certain circumstances is not analogous, because they are paid by a trustee, only on the assumption that there exist no paramount claims of creditors; but here the directors of the Company having the power to dissolve the Company, and to wind up its affairs, and having exercised that power, the effect of making the call exclusively on those in the same predicament as the present Appellants, will be substantially to set aside the arrangement which the directors have duly made.

There must be a declaration that the scripholders who have received the 15s. are not bound to bring that sum into contribution, but the call is to be made on all per

sons rateably whom the Master finds to be contributories, and to be such a sum as being made on all will produce the sum contemplated by the Master. The order of the Vice-Chancellor, so far as it directs the costs of the motion before him to be paid by the Appellants, must be discharged, but I shall give no costs to the Appellants, as they have been wrong as well as right in their contention before me.

1852.  
PREECE &  
EVANS'S  
CASE.

In the Matter of the ST. JAMES'S CLUB ;  
AND OF  
THE JOINT-STOCK COMPANIES WINDING-UP  
ACTS, 1848 and 1849.

July 8, 9.

THIS was an appeal by Captain *Greenway*, a member of the above club, from the decision of the Vice-Chancellor *Knight Bruce*, ordering the dissolution and winding up of the club under the Winding-up Acts. The order was made on the petition of several gentlemen forming the committee of management of the club. The petition stated that the club was formed in *November* 1848, and set out its rules, among which were provisions empowering the expulsion of any member infringing the rules of the club, and directing that all the concerns of the club, the domestic and other arrangements, should be conducted by a committee consisting of twenty-four members ; and that there should be a finance and house committee of seven members, to be chosen from the general committee, who were to have the exclusive control of the finance and domestic affairs of the club ; and that all members should pay their bills for every expense they incurred in the club before they left the house.

Before *The*  
*Lord Chan-*  
*cellor* LORD  
ST. LEON-  
ARDS.

Clubs are not  
partnerships  
or associa-  
tions within  
the meaning  
of the provi-  
sions of  
the Joint-  
stock Com-  
panies Wind-  
ing-up Acts.

1852.

*In re*  
ST. JAMES'S  
CLUB.

The petition, after setting forth various reports of the committee of management as to the financial difficulties of the club, and a resolution of a special general meeting of the club, calling on each member to contribute the sum of 60*l.* to meet the liabilities of the club, and that some of the members had paid the 60*l.*, stated that in consequence of the failure of the appeal to the general body of the club, another special general meeting was held, whereat it was resolved that the club should be closed forthwith, and that the managing committee should proceed to wind up its affairs, and in the event of their failing to make an amicable and extra-judicial arrangement, that they should adopt such measures, either in law or in equity, against the recusants as they might be advised under the circumstances of the case.

The petition stated, that in accordance with the last resolution the club had ceased to be carried on, and that the Petitioners had proceeded to wind up its affairs, and had paid and compromised some of the debts due from the club, but that there was still due and owing from the club upon debentures, and to various tradesmen and others, upwards of 25,000*l.*, for the payment of which sum the Petitioners were liable at law; that one of the creditors of the club had brought an action at law against one of the Petitioners; and that other creditors had applied to and threatened to bring actions at law against him for their respective debts, but had consented to stay proceedings on the representation that application was about to be made to the Court for the winding up the affairs of the club.

The petition then stated, that in addition to a balance of 1329*l.* in the hands of their bankers, there was a sum of 18,000*l.* and upwards due to the club from the various members thereof, for unpaid entrance monies  
and

and subscriptions, and that the assets of the club were insufficient, by the sum of 16,500*l.* or thereabouts, for the payment of its debts and liabilities; and after stating that the Petitioners claimed to be contributories of the club, prayed that the club might be dissolved, and its affairs wound up under the Winding-up Acts.

1852.  
  
*In re*  
 ST. JAMES'S  
 CLUB.

The case came on to be heard before the Vice-Chancellor on the 12th July 1851, when his Honor was of opinion that the club was an association liable to dissolution and winding up within the meaning of the Winding-up Act 1849, and that the condition of the club at the date of the petition was such as brought it within the 7th and 8th cases of the 5th section of the Winding-up Act 1848. From that decision the present appeal was brought.

*Mr. Bacon* and *Mr. Burdon*, for the Appellant.

We submit that the whole scope and tenor of the Winding-up Acts show that clubs were not meant to be included within their provisions; the 52nd section of the Act 11 & 12 *Vict.* c. 45, evidently contemplates a company trading for profit, and the 76th section speaks of the duty of the Official Manager to make out lists of the contributories and "the number of shares or extent of interest to be attributed to each," terms wholly inapplicable to clubs; the 83rd section also, relating to calls on contributories, authorizes such calls to be made only so far as the contributory should "be liable at law or in equity to pay the same;" but it is clear that the Appellant, who is only an ordinary member of this club, is under no obligation to pay more than his annual subscription: *Fleming v. Hector* (a), *Todd v. Emly* (b). But it will be contended, that if not within the provisions of the Act 11 & 12 *Vict.* c. 45, clubs are associations of

(a) 2 *M. & W.* 172.

(b) 8 *M. & W.* 505.



1852.

*In re*  
ST. JAMES'S  
CLUB.

of more than seven persons, and as such, within the operation of the 12 & 13 *Vict.* c. 108; but the main object of that Act was to include all inchoate and abortive companies or associations of more than seven persons, but evidently pointing only at trading companies; thus the 8th section refers to "the course of carrying on the business thereof." We submit, however, that even if clubs of this nature should be held to be within the letter of the second Act, they are clearly not within its spirit, and that it would be most inexpedient to dissolve this club under the machinery of the Winding-up Acts, *Ex parte James* (a).

Mr. *Malins* and Mr. *Toulmin*, *contra*.

The Vice-Chancellor was quite justified in deciding as he did under the provisions of the 5th section of the Act 11 & 12 *Vict.* c. 45; but if that statute did not confer the jurisdiction, the 1st section of the Act 12 & 13 *Vict.* c. 108, applying as it did to all associations deriving common benefits and subject to common liabilities, was quite sufficient and comprehensive enough to embrace such associations as these. The Acts are not to be restricted to commercial associations; this case being one in which there is a right to contribution falls directly within the objects and scope of the Winding-up Acts. If the present were a solvent club, all the members would be properly parties to a suit in which accounts would have to be taken, and the assets realized, *Richardson v. Hastings* (b). There is no doubt here as to the existence of liabilities, and it must be assumed that the general body have sanctioned the expenditure, which, but for unforeseen events, would have resulted to their common benefit.

Mr. *Bacon*, in reply.

*The*

(a) 1 *Sim.*, N. S. 40.

(b) 7 *Beav.* 301.

*The* LORD CHANCELLOR.

1852.

*In re*  
ST. JAMES'S  
CLUB.

**T**he question, whether clubs, in the ordinary acceptation of the term, are within the Winding-up Acts, depends upon the construction of these Acts; but before entering upon that consideration, it is necessary to consider the nature and constitution of such clubs: they are, generally speaking, (and there is nothing particular in this club), all formed on this principle: the candidate must be elected, he must then pay an entrance fee, and also an annual sum or subscription. In this club there was a rule under which, if the person elected did not pay the entrance fee and annual subscription, he ceased to be a member; there was also an express rule, that if a member's conduct was objectionable out of the house, he might be dismissed from being a member. What, then, were the interests and liabilities of a member? He had an interest in the general assets as long as he remained a member, and if the club was broken up while he was a member, he might file a bill to have its assets administered in this Court, and he would be entitled to share in the furniture and effects of the club; but he had no transmissible interest, he had not an interest, in the ordinary sense of the term capital in partnership transactions; it was a simple right of admission to, and an enjoyment of, the club while it continued. Under such circumstances the difficulty would be very great in bringing clubs within the operation of the Winding-up Acts; and in my opinion, any decision to that effect would be attended with much mischief.

**T**he law, which was at one time uncertain, is now settled, that no member of a club is liable to a creditor, except so far as he has assented to the contract in respect of which such liability has arisen. The member pays on the spot, and were he also liable to those supplying the articles, he would pay twice over.  
If,

1852.

*In re*  
ST. JAMES'S  
CLUB.

If, however, the Legislature has declared that associations such as these fall within the Winding-up Acts, then that construction must, of course, prevail. In considering this point, I will first refer to the Act 7 & 8 *Vict.* c. 111, which is confined expressly to commercial or trading companies; all the provisions of that Act point to trading companies. The Act for *Ireland*, 8 & 9 *Vict.* c. 98, in the next year, is to the same effect. Then followed the Acts 11 & 12 *Vict.* c. 45, and 12 & 13 *Vict.* c. 108. Under the former of these Acts no question could be raised, for it confined itself to the objects of the first Act to which I have referred, enlarging indeed its powers, but embracing only the same purposes. It recites, that further facilities should be given for the dissolution and winding up of joint-stock companies and other partnerships, and it empowers any one who is a contributory to present a petition for the dissolution of such companies in any one of certain specified cases. The first six cases refer to trading companies; the seventh applies to the case where a company shall have been dissolved, or shall have ceased to carry on business, or shall be carrying on business only for the purpose of winding up its affairs, and the same shall not be completely wound up, evidently referring to the trading or commercial companies to which that Act applies. If, therefore, this case had stood on that Act, there could have been no question, this club not being a trading company; and though it might be classed under the head of companies yielding convenience and benefit, yet clearly not among those yielding profit from trade. No man can receive profit in that sense from a club. The 12 & 13 *Vict.* c. 108, extends the Act of the 11 & 12 *Vict.* c. 45, and says, "notwithstanding anything in the said Act contained importing a more limited application thereof, the same shall apply to all partnerships, associations and companies, whereof the partners or associates are

not

not less than seven in number, whether incorporated or unincorporated;" which enactment is followed by a proviso which must not be lost sight of. The words are very wide, no doubt; but still, I must give a reasonable construction to the Act, which is *in pari materiá*, and incorporated with the Act of the preceding year. I cannot hold it to apply to every association or company. If I were to do so, I might be called upon to carry the application much lower than to such a club as that now in question. A cricket club, an archery society, or a charitable society, would come under the operation of the Act, and indeed every club would be included. Though "associations" are mentioned I cannot think that word is to be treated without regard to the particulars with which it is associated. I shall do as Lord *Bacon* did in treating of the Statute of Uses, when he said "The nature of a use is best discerned by considering what it is not" (a), so I will not say what associations are within the Acts; but bearing in mind that the individuals who form a club do not constitute a partnership, nor incur any liability as such, I think associations of that nature are not within the winding-up Acts. I find in all these Acts to which I have referred, that every provision is inconsistent with including such an association as this club is. If such had been the intention of the Legislature, why should not the word "club" have been expressly mentioned? If, however, the Legislature has used ambiguous expressions, I will not extend their signification beyond their natural import. At first sight, the word "association" would seem to include the case of clubs, but in looking at the context, I am clearly of opinion that it does not.

1852.

*In re*  
ST. JAMES'S  
CLUB.

It was said, that the debts were incurred with the sanction of the general body of the members. It is clear that

(a) *Reading on the Statute of Uses, Bacon's Works, vol. 4, p. 161. Ed. 1803.*

**Chancellor Knight Bruce**, made on a claim, and dated the 5th August 1851, whereby it was declared that the Plaintiff *Mary Dunkley*, the wife of the said Defendant *William Judkins Dunkley*, was entitled to have the sum of 1000*l.*, devised to her by the will of her father *Thomas Whitmell*, settled and secured for the benefit of herself during her life for her separate use without power of anticipation, and upon her death, for her children as tenants in common.

1852.  
DUNKLEY  
v.  
DUNKLEY.

The Plaintiff filed her claim by her next friend, and thereby stated to the following effect:—That *Thomas Whitmell*, her father, by his will bearing date the 1st October 1824, gave and devised certain lands and premises in the parish of *Crick* in the county of *Northampton* unto his wife *Sarah Whitmell* for life or so long as she should continue his widow, and after her decease or her ceasing to be his widow, he gave and devised the same unto the Defendants *William Lovell* and *Charles Heygate* in trust to preserve contingent remainders, and he then gave and devised the said lands and premises at *Crick* to the use of his daughter, the Plaintiff *Mary Dunkley* then *Mary Whitmell*, for life, remainder to the said trustees to preserve contingent remainders, remainder unto any husband with whom the Plaintiff might happen to intermarry for his life, remainder to the said trustees to preserve contingent remainders, remainder to the use of the first son lawfully to be begotten of the body of the said Plaintiff and the heirs male of the body of such first son lawfully issuing, with divers remainders over; and the said testator gave and devised certain lands and premises situate at *West Haddon* in the county of *Northampton*, unto the Plaintiff her heirs and assigns for ever; and the testator gave and bequeathed unto the said *William Lovell* and *Charles Heygate* the sum of 1000*l.*, part of his personal estate,  
in

1852.  
 DUNKLEY  
 v.  
 DUNKLEY.

involved in great pecuniary embarrassment, the Plaintiff, in order to relieve him, joined in mortgaging the said hereditaments and premises at *West Haddon*, and in 1834 the said hereditaments and premises were sold by the mortgagees for 4800*l.*, which was received by the mortgagees and creditors of *W. J. Dunkley*:—that on the 5th *December* 1833 a fiat was issued against *W. J. Dunkley*, under which he was adjudged a bankrupt and the present Appellants became his assignees:—that there were two children of the marriage, namely, a son born on the 22nd *September* 1826, and a daughter born on the 10th *November* 1828:—that in *December* 1838 *W. J. Dunkley* abandoned and deserted the Plaintiff and his children, and had never since in any manner contributed to their maintenance or support, but they had resided with and been supported by the testator's widow until her death, which took place on the 18th *October* 1850:—that *W. J. Dunkley* had since the year 1840 been living in adultery, and that by a decree of the Ecclesiastical Court bearing date the 15th *February* 1851, obtained in a suit instituted by the Plaintiff, a divorce *à mensâ et thoro* was decreed in favour of the Plaintiff:—that the assignees in bankruptcy had since the death of *Sarah Whitmell* entered into the receipt of the rents of the hereditaments and premises situate at *Crick*, amounting to about 200*l.* a year, and had also required the trustees to pay or transfer the legacy of 1000*l.*:—that the assignees had also advertised for sale the interest of the Defendant *W. J. Dunkley* in the hereditaments and premises at *Crick*:—that the income to which the Plaintiff was entitled under the indenture of the 21st *August* 1826, was not sufficient for the due and proper maintenance of herself and her said children.

Under these circumstances, the Plaintiff claimed to have the sum of 1000*l.* settled and secured for the benefit

1852.  
 {  
 DUNKLEY  
 v.  
 DUNKLEY.

benefit of herself and her children, exclusively and independently of *W. J. Dunkley* or of any person or persons claiming under him, and that the trustees might be directed to pay the dividends accrued due since the death of *Sarah Whitmell*, and to accrue due thereon unto the Plaintiff for her life for her sole and separate use. To this claim *W. J. Dunkley*, the Assignees in bankruptcy, and the Trustees of the testator's will were made Defendants.

On the part of the Assignees, and in opposition to the Plaintiff's claim, evidence was produced to show that the husband had expended money to a large amount in improving the estate at *West Haddon*; that the husband's father had made some provision by his will for the Plaintiff and her children, subject to a life interest of his widow, then seventy-three years of age; and that the creditors had only received a very small dividend on their debts. On the part of the Plaintiff, it was shown that she would have to pay the costs of the suit in the Ecclesiastical Court, the husband, though ordered to do so, being unable to discharge them, and that she had in reality little to expect from the provision referred to by the Assignees.

The claim came on to be heard before the Vice-Chancellor *Knight Bruce*, when his Honor made the order settling the whole 1000*l.* on the Plaintiff and her children, from which the present appeal was brought by the Assignees, as before mentioned.

*Mr. Bethell*, and *Mr. Leach*, for the Plaintiff.

They supported the order of the Vice-Chancellor, referring to the facts above stated, and submitting that the principle applicable to cases like the present was, that where the wife was deserted by her husband and he did

1852.  
DUNKLEY  
v.  
DUNKLEY.

did not and could not discharge his duty of supporting her, the Court would hold her to be entitled to the whole income for the maintenance of herself and children. They contended, that the assignees in bankruptcy of the husband could only be entitled to the same equities as the husband himself, and that what particular provision should be made for the wife, was a matter quite in the discretion of the Court. They cited *Elliott v. Cordell* (a), *Gardner v. Marshall* (b), *Gilchrist v. Cator* (c), *Scott v. Spashett* (d), *Napier v. Napier* (e).

Mr. Schomberg, and Mr. C. Burton, for the Assignees.

They endeavoured to make out that, having regard to the property which the husband had received with his wife and to what he had expended on that property, the creditors had an equitable claim to some share of the 1000l. They contended that there was no case where the wife had any property settled to her separate use, that the Court had given her the whole fund. They urged the desirableness of laying down some definite rule, applicable to cases like the present, rather than leaving it to the discretion of the Judge in each instance, thus rendering litigation absolutely necessary, from the inability of counsel to advise their clients as to their rights. They referred to and commented on the cases cited on the other side, and mentioned, also, *Green v. Otte* (f), *Vaughan v. Buck* (g), *Greedy v. Lavender* (h).

Mr J. H. Palmer, for the Trustees, took no part in the argument.

Mr. Bethell replied.

The

(a) 5 Madd. 149.

(b) 14 Sim. 575.

(c) 1 De G. & S. 188.

(d) 3 Mac. & G. 599.

(e) 1 Dru. & War. 407.

(f) 1 S. & S. 250.

(g) 1 Sim., N. S. 284.

(h) 13 Beav. 62.



1852.

**DUNKLEY**  
v.  
**DUNKLEY.**

*The* LORD CHANCELLOR.


I have been much pressed, in the course of the argument, to lay down some rule as to the portion of property which, in cases of this kind, shall go to the wife and thus by not leaving the matter any longer at large to enable counsel to advise their clients with greater certainty. No one can be more disposed than I am, to lay down rules for the guidance of the profession; but must be remembered that where there is a discretion be exercised by the Judge,—and it has always been exercised in cases of this kind,—it is a judicial discretion and that the Court has no more the power of doing what it likes in reference to it, than it has to alter a rule of law: I was therefore sorry to hear the language which was addressed to me on this subject. In the present case I have a discretion, and that discretion must exercise in conformity with the rules of the Court.

No one will dispute, that, according to the old practice and in ordinary cases, where there was no misconduct the fund used to be divided nearly equally between the assignee of the husband and the wife. I believe that when in *Ireland* I set the example of saving a reference to the Master, and of deciding at once the proportion of property to be settled on the wife; for in *Napier v. Napier (a)*, I gave to the wife and children 600*l.* out of 1000*l.*, leaving 400*l.* for the assignees of the husband for the benefit of his creditors, thinking that this division met the justice of the case.

Some of the authorities cited on the present occasion have been referred to as establishing a rule, which forbids me to give to the wife the whole of the fund. It is true that such a rule appears to have existed in Lord *Eldon's* time

(a) 1 *Dru. & War.* 407.

time, but it is equally true that it has not been since acted on. In *Green v. Otte* (a), a question was raised, whether in the decree for a reference to the Master to approve of a proper settlement to be made upon the wife, there should be a direction to the Master to have regard to any other property which the husband might have possessed in right of the wife; and the Vice-Chancellor said, "Upon a reference to the Master to approve of a proper settlement upon the wife out of a particular property, it is always usual to direct the Master to have regard to any settlement which the husband may have made upon the wife, *aliunde*: if the extent of the provision for the wife out of the particular property in question, is to be affected by any prior settlement of other property made by the husband, it necessarily follows that regard must also be had to any other property possessed by the husband in right of the wife: for the prior settlement may not be adequate, or more than adequate, to the equity of the wife in respect of the other property possessed in her right:" here, then, we have expressions which go to show that in fact you must consider what the wife's fortune was, and how it was received. In *Gardner v. Marshall* (b), the Master proposed, that having regard to the large amount of property that the husband had received from the estates of his wife's relations, to her entirely unprovided condition, and to her former circumstances and position in life, the whole of the interest of the fund in question ought to be settled on her for her separate use for life; and the Vice-Chancellor said that the circumstances of the case fully justified the conclusion to which the Master had come: this case shows, without dwelling on the particular facts, that where circumstances justify it the Court will give to the wife the whole of the fund. Thus, in *Gilchrist v. Cator*

1852.  
  
 DUNKLEY  
 v.  
 DUNKLEY.

(a) 1 S. & S. 250.

(b) 14 Sim. 575.

1852.  
 DUNKLEY  
 v.  
 DUNKLEY.

v. *Cator* (a), the entire fund was given to the wife. *Scott v. Spashett* (b) was a very strong case, for there, where the assignment was to a particular assignee of the husband, the whole fund was given to the wife. Without now saying whether it can stand as to the particular assignee for value, it is clear from these authorities that the practice has been to give the whole fund, under circumstances, to the wife. In *Vaughan v. Buck* (c), two-thirds of the dividends of the fund were given to the wife: it might be a proper case for this being done, the dividends of the fund having been previously directed to be paid to her husband during his life, or until further order; and I have no fault to find with that decision.

The authorities are therefore clear, and I have not referred to them because I have any doubt upon the point but because I do not wish to be thought as unsettling anything that has been previously established: they are consistent with the conclusion, that in every instance the Court has been in the habit of looking at the circumstances of the case, and of holding, that where it thinks it right to give the whole fund to the wife, it has the power to do so.

Then, referring to the facts of the case before me it appears that, &c. (His Lordship here recapitulated the several facts above stated); and the question is, whether the Assignees should have any part of the 1000*l*. It has been said that the property sold for 4800*l*., which went to the mortgagees and not to the husband; but these mortgagees were the husband's own creditors, and this is a question between the husband and wife. The Vice-Chancellor

(a) 1 *De G. & S.* 188.

(b) 3 *Mac. & G.* 599.

(c) 1 *Sim., N. S.* 284.

Chancellor thought that, under the circumstances, he was right in giving the whole 1000*l.* to the lady: the husband's assignees represent his creditors, and they can have no higher claim than she has: all the moral rights are on the side of the wife, and fortunately the legal rights coincide with them. The appeal must therefore be dismissed, and with costs.

1852.  
DUNKLEY  
v.  
DUNKLEY.

SCRIVENER v. SMITH.

July 16, 17.

THIS was an appeal by the Defendant, *G. M. Fast*, from an order of the Vice-Chancellor Lord *Cranworth*, made on the 15th *July* 1851, on a claim presented for the purpose of obtaining the decision of the Court on the construction of the will and codicil of the late Major-General *Fast*. The testator by his will gave the sum of 110,000 rupees (then in the government funds in *Calcutta*), to the trustees and executors of his will, upon trust to apply the interest thereof for the separate use of his daughter *M. A. Fast*, for life; and he gave the interest of his residuary estate to the same trustees, in trust for his wife for life, and after the death of either of them, his daughter or wife, for the survivor for life; and after the death of the survivor he directed the trustees to invest the whole of the trust-moneys in lands, to be settled on his son *G. M. Fast* for life, with remainder to the use of his first and other sons in tail male, with remainder to his daughter *E. C. R. Scrivener* for life, with remainder to the use of her eldest son *J. W. F. Scrivener* for life, with remainder to the use of the first and other sons of *Humphry Howorth*, the husband of his daughter *Louisa* in tail, with divers remainders over.

Before *The Lord Chancellor* LORD ST. LEONARDS.

A testator bequeathed the interest of certain personal property to his wife for life; "at her death one half of the said property I give to my son *G. M.*, the remaining half to be equally divided between my two daughters and at their deaths such shares to be equally divided among their children respectively: "Held, that the son took an absolute interest in the moiety.

*M. A. Fast* having died, the testator made a codicil to his will, which was in the following words:—

VOL. II.

D D

D. M. G. "Codicil

1852.

SCRIVENER

v.

SMITH.

"Codicil to the will of Major-General *Fast*. In consequence of the demise of my eldest daughter *Mary Ann*, I now give the interest of my property in the government funds in *Calcutta* to my wife *Ann Fast* for her life. At her death one-half of the said property I give to my son *George Mainwaring Fast*, the remaining half to be equally divided between my two daughters *Louisa Catherine*, wife of Captain *Howorth* of the 39th Regiment of *Bengal* Native Infantry, and *Charlotte Elizabeth Rhoda*, widow of the late Lieutenant *Francis Scrivener*, and at their deaths such shares to be equally divided among their children respectively. The executors and trustees to be the same as enumerated in my will which I signed on the 19th of *February* 1849."

The testator's widow having died, the claim was filed by the testator's daughter *E. C. R. Scrivener*, against the trustees and executors of her father's will, her brother, *G. M. Fast*, the Appellant, and her sister *Louisa Howorth* and her husband. The Vice-Chancellor Lord *Cranworth* held, that according to the true construction of the will and codicil, *G. M. Fast* was entitled, for his life only, to the moiety of the trust property in the government funds in *Calcutta*, bequeathed to him by the codicil. From that decision *G. M. Fast* now appealed to the Lord Chancellor.

Mr. *Rolt*, Mr. *Daniell*, and Mr. *G. Horsey*, for *G. M. Fast*, in support of the appeal.

The bequest of the residue contained in the will remains wholly unaffected by the codicil. The sole question is, what is the antecedent to the words "such shares" and "their children." The natural import of the sentence is to refer the qualification to the shares of the daughters only, and the ulterior division among their children

children can only refer to the division which had been previously directed between the daughters.

1852.

SCRIVENER

v.

SMITH.

Mr. *Bethell* and Mr. *Greene*, for the Plaintiff and the other Defendants in the same interest, in support of the Vice-Chancellor's order.

There is only one subject-matter of bequest, and there is also only one common object in both instruments. By the will, the residue was given to *G. M. Fast* for life only, and the codicil was occasioned by the death of *M. A. Fast* in the lifetime of the testator; there is nothing in the codicil importing a change of the testator's intention, whereas the whole scope of the will leads to the conclusion that the same interest was intended to be given in the codicil. The words of gift also are only once used, while they apply to both bequests; the restriction, therefore, ought to have a co-extensive application.

Mr. *Marett*, for the Executors.


Mr. *Rolt*, in reply.

The LORD CHANCELLOR.

My present impression is, that the Appellant takes an absolute interest. The words of the codicil must be read in their ordinary sense, and reading them in that sense I think it would be difficult to apply the construction which has been put upon them by the Vice-Chancellor. The daughter, for whom the testator had provided by his will, having died, he gave the interest of the whole of his property to his wife for life; he knew, therefore, how to give a life interest when he wished to give it; he then adds, "at her death one-half of the said property I

D D 2

give

1852.  
  
 SCRIVENER  
 v.  
 SMITH.

give to my son." If he had stopped there, there could have been no question; but it is said that the words "give" being only once used, the absolute gift to the son is cut down by the limited interests, which are found in the next clause, to the daughters. In my opinion you cannot import the words controlling the latter part of the sentence into the previous part of the sentence, so as to qualify the absolute interest there given. The words "such shares," in the second branch of the sentence stand on a different footing from the half or share which the testator has given in the first branch of the sentence. He had given one moiety to his son: he then proceeds to give the remaining half to his daughters; and the words "at their deaths such shares," naturally relate to the shares in the remaining half. I think also, that in grammatical construction the words "such shares" are more properly referable to their immediate antecedent and would not properly take in as their antecedent the gift to the son.

I will look at the will again before pronouncing my judgment, but I do not think I can use the limitation in the will in order to put a construction on the codicil. This is an abstract gift taken out of the will. [His Lordship here referred to the limitations of the will, and proceeded:]—The testator has there made a provision for certain events for his son, and for a particular class of his children; it therefore does not follow that if the construction of the Court below were adopted, the same parties would take under the limitations of the will and codicil. It is not altogether an unimportant circumstance, that at the date of the codicil the son had no issue, and that the daughters had issue; moreover, if the gift, which was *primâ facie* absolute, was to be cut down by something like implication, it is to be observed that in the codicil there is no gift over in case the son should die witho

without children, and in that event the construction of the Vice-Chancellor would leave an interest undisposed of, which would go in a manner contrary to the testator's intention.

1852.  
 SCRIVENER  
 v.  
 SMITH.

I have read the will and codicil over again, and I am of opinion that the Appellant takes an absolute interest.

July 17.

McCALMONT v. RANKIN.

July 20, 21.

THE Plaintiffs in this suit, *McCalmont & Co.*, were a mercantile and agency house at *Liverpool*, and had entered into an agreement with two other mercantile firms, *Mackay Brothers, & Co.*, of *Liverpool*, and *H., J., & D. Mackay*, of *St. John's, New Brunswick*, that *Mackay Brothers, & Co.* should retire from business at *Liverpool*, and that the Plaintiffs should accept the agency of *H., J., & D. Mackay*. In pursuance of this agreement, which was established by letters of the 1st and 16th *February* 1841, an account was opened by the Plaintiffs with *H., J., & D. Mackay*, and on receipt of consignments and remittances from them, advances were made by the Plaintiffs.

Before The  
 Lord Chan-  
 cellor LORD  
 ST. LEON-  
 ARDS.

The provi-  
 sions of the  
 Ship Regis-  
 try Acts  
 apply equally  
 to contracts  
 as to sales;  
 and the whole  
 frame of these  
 Acts nega-  
 tives any  
 equity result-  
 ing out of  
 the doctrine  
 of notice.

An unregis-  
 tered agree-  
 ment, there-  
 fore, with the  
 registered  
 owner of a  
 ship, which  
 the owner  
 subsequently

In the month of *June* 1841, the Plaintiffs received from *H., J., & D. Mackay* information to the effect that they were about to launch a ship, to be called the *Miracle*, which ship, with a cargo of timber, they in-  
 tended

transfers for value to another person who has notice of the agreement, cannot be enforced either as against the ship or its proceeds.

Whether upon such a contract an action for damages could be sustained, *quare.*

How far actual fraud in such a case would be relievable in equity, *quare.*



1852.  
 McCALMONT  
 v.  
 RANKIN.


tended to send to the Plaintiffs as a consignment to the credit of the account. At the time of the receipt of such information, the Plaintiffs' advances greatly exceeded the amount which had been stipulated upon. By a letter of the 31st *July* 1841, *H., J., & D. Mackay* inclosed to the Plaintiffs a power of attorney to sell the ship *Miracle*, and on the same day wrote to the Plaintiffs in the following terms: "We now hand you invoice and bill of lading and specification of the cargo, in the barque *Miracle*, to your address. Amount, as per invoice, 7616*l.* 7*s.* 3*d.* sterling, which we hope will arrive to a good market. Referring you to *Mackay, Brothers* as to insurance, we are," &c.

On the 19th *July* 1841, *Mackay, Brothers, & Co.* having become embarrassed, wrote to the house of *H., J., & D. Mackay*, at *St. John's*, as follows: "19th *July* 1841.—In consequence of *Duncan's* failure, *McCalmont* will not accept our bills for the sums you sent;" and added the following direction with respect to future remittances: "Send your remittances in future to us, and not to *McCalmonts*, and call the other ships the *Birmingham* and *Stafford*, as first intended. Draw no more bills, but go to work and complete your ship and cargo in hand, and pay nothing but for this purpose. Put your goods in prime order of all kinds, and sell for private paper till all is closed. Get the ship away first, if you can." This letter was received by *H., J., & D. Mackay* after they had sent the bill of lading and power of attorney to the Plaintiffs, but the *Miracle* had not then left *St. John's*.

On the 28th *July* 1841 the ship *Miracle* stood registered in the port of *St. John's*, in the name of *James Mackay*, one of the partners of the *St. John's* house, as the ship's own

## CASES IN CHANCERY.

owner, and *Thomas Benson* was described as the master. *H., J., & D. Mackay*, in consequence of the information contained in the letter of the 19th *July* 1841, took upon themselves to alter the destination of the *Miracle* and her cargo, and accordingly, on the 5th *August* 1841, the ship *Miracle* and her cargo were transferred to the firm of Messrs. *Crane & McGrath*, and the ship was then registered in their names, and a certificate of British registry was granted, in which *T. P. Crane* was described as master. On the 19th *August* 1841, Messrs. *Crane & McGrath* executed a bill of sale of the ship for 4000*l.* to *John Pollok*, when a new certificate was granted in his name, and *Henry Bacon* was described as master, in the place of *T. P. Crane*, who was discharged. *J. Pollok* was a member of the firm of *R. Rankin & Co.*, at *St. John's*, and all the members of that firm, except *J. Pollok*, were members of the firm of *Rankin, Gilmour, & Co.*, of *Liverpool*. *R. Rankin & Co.* also purchased the cargo of the ship *Miracle*, and took a bill of parcels, in which the purchase-money of the ship was stated "as per bill of sale, paid for by note at six months," and of the cargo as 1200*l.* "by sum charged *Robert Rankin & Co.*, in account with *Crane & McGrath*." A new bill of lading was signed by the new master, *H. Bacon*, and the ship and cargo were consigned by Messrs. *R. Rankin & Co.*, with a power of attorney from *J. Pollok* to sell the ship to Messrs. *Rankin, Gilmour, & Co.* On the arrival of the ship at *Liverpool*, the Plaintiffs asserted their claim to the ship and cargo, and on the repudiation of that claim filed their bill against *R. Rankin*, who was the only member of the firms of *R. Rankin & Co.* and *Rankin, Gilmour, & Co.* within the jurisdiction, praying process against the other members of those firms, and *Crane & McGrath*, and also against *Bacon*, and the assignees of *Mackay, Brothers*, who had become bankrupts.

1852.  
  
 McCALMONT  
 v.  
 RANKIN.

The

1852.  
 McCALMONT  
 v.  
 RANKIN.

The bill charged, that the bill of lading, specification, invoice, and power of attorney, constituted in equity an agreement that the ship should be sold by the Plaintiffs, and that the proceeds should be received and carried to the credit of the account; that the transfer to *Crane & McGrath* was fraudulent and colourable; that the consignment of the ship and the power of attorney could not be revoked without practising a gross fraud on the Plaintiffs; and that the Defendants *Crane & McGrath* and *J. Pollok* had notice of the bill of lading having been previously signed in favour of the Plaintiffs, and that the cargo had been consigned to them.

The bill prayed that the transfers of the *Miracle*, and the sales of the cargo subsequently to the letters of the 31st *July* 1841, might be declared to be fraudulent, and to have been made for the purpose of defrauding the Plaintiffs; and that *J. Pollok*, and the partners of *R. Rankin & Co.*, and *Rankin, Gilmour, & Co.*, and *H. Bacon*, might be ordered to deliver up possession of the *Miracle*, her cargo, certificate, and papers to the Plaintiffs; and that such of the Defendants as might be proper and necessary parties might be decreed to execute a bill of sale, or other sufficient writing, for transferring the ship to the Plaintiffs, or as they might direct; and that the cargo might be sold, and the Plaintiffs declared to have a lien on the proceeds, for the balance which might be found due to them on the said account; or if the ship and cargo, or either of them, had been sold by the Defendants, or any of them, that they might be decreed to account for the proceeds arising from such sale; and that the Plaintiffs might be declared to have a lien on such proceeds for the balance; but if the Court should be of opinion, that, by means of the transfers and sales, the Plaintiffs had lost their claims, rights, and interests, upon the ship and cargo, or any part thereof, then

**then** that the Plaintiffs might be declared to have a lien **on** the nominal or ostensible considerations, or on some **or** one of them, for the balance; and that, notwithstanding such nominal or ostensible considerations **might** have been paid, that the Defendants *Crane & McGrath* and *J. Pollok*, and such of the other Defendants as might be liable for the same, might be decreed to make good to the Plaintiffs such lien as they **might** be declared entitled to. The bill also prayed an **injunction** to restrain *H. Bacon*, the master, from parting **with** the ship, papers, and cargo, and to restrain *J. Pollok* and the other Defendants from taking possession of the **ship**, papers, or cargo, from selling or otherwise disposing of the same, and for a receiver of the ship and **cargo**.

1852.  
  
 McCALMONT  
 v.  
 RANKIN.

The Defendant *R. Rankin*, by his answer stated, that **he** and his partners were perfect strangers to the matters **alleged** by the bill, never having heard of any of the **dealings** and transactions between the Plaintiffs and the **Messrs. Mackay**, previously to the filing of the bill; and **he** denied that, at the time of the transfer, registration, **or** assignment being made, he or his partners had any **notice** of the bills of lading, specification, invoice, or power **of** attorney having been remitted to the Plaintiffs.

The following extracts from letters which were in evidence in the cause, and written by *R. Rankin & Co.* to *Rankin, Gilmour, & Co.*, were relied upon by the Plaintiffs:—

“ *St. John's*, 14th of *August* 1841.

“ Messrs. *Rankin, Gilmour, & Co.*

“ Dear Sirs,—We need scarcely, we presume, now advise you that we have the *Mackays'* downfall to announce: they stopped immediately after the leaving of

1852.  
McCALMONT  
v.  
RANKIN.

the last steamer, and the mills are all at a stand. The deals have all been sold by the Bank, *B. N. America*, who by that means are secured, and the great bulk of their property available here has been transferred over to their indorsees, *Crane & McGrath*, who, it appears, have backed their paper to the extent of about 16,000*l.* currency, or not quite so much. They have got, amongst the rest, two vessels with their cargoes on board, now ready for sea, and which, for an advance of 5000*l.* currency made them by us to go towards the paying the Commercial Bank and *New Brunswick* Banks on a six months' obligation, they now transfer to us. These ships will early in the week sail for your address; and to show you how the matter stands, we now state the transaction. The *Miracle* is 567 tons register, and built by *F. & T. Ruddock* up near the bridge, and well built and strong, at least so *Mr. Duncan*, who has examined her, states. We advance on her, say at the rate 6*l.* sterling, making nearly, say 4000*l.*, on the cargo and freight; as they are in the meantime a little doubtful, and the arrangement not finally completed, we have not yet consented to give anything. The *Sylvia* and her freight, say 197 tons, at 5*l.* sterling, 1400*l.*, 5400*l.* to be paid by us in six months' paper, on getting delivery and title to the whole. The cargo on board the *Miracle*, although a bill of lading has gone forward, you will have no difficulty with, and by next steamer all the documents will go forward to you, and a full and complete explanation of the whole transaction. In the meantime you will please call on *Hugh Mackay* to cancel the insurance already done on that ship's cargo and freight, and re-insure her, say, without reference to the first insurance on the *Miracle*, 567 tons, *Bacon*, master (barque rigged), for *Liverpool*, to sail within a week or so, a sum to cover our advance on the cargo, say 1000*l.*, and on freight, say 750*l.* sterling."

On

On the 31st August 1841, *R. Rankin & Co.* wrote to *Rankin, Gilmore & Co.*: “The *Miracle* we believe was bargained for by *Hugh Mackay* with some parties in *Liverpool*, without, however, his having any authority from *James Mackay*, who was the registered owner, and in whose name the builder’s certificate passed; subsequently thereto a letter of attorney was sent home, authorizing him to convey; but of course in a few days thereafter, *James Mackay* conveyed away the property, and we then bought it, so that, with regard to the ship, no difficulty can arise; the case is different with respect to her cargo, that was shipped and invoiced, and a bill of lading sent to another house; but we are led to understand that this house had more property in their hands than they were in advance for, consequently they have no claim on the cargo. To remedy this, however, *Crane & McGrath* took a bill of sale of the cargo, and then gave us a bill of parcels for both ship and cargo, so that this was the transfer of a new master, and the substitution of new bills of lading will, we think, effectually screen this from all parties; but even if it did not, we, as owners of the ship, are fully entitled to freight for it at all events; but we hope, and doubt not, that you will be able to secure both ship, cargo, and freight; and so soon as you see it effectually secured, without any difficulty, we wish you will advise us, as we do not wish to settle the account until we hear from you. We now inclose the copy, letter of attorney, original of *Mackay’s* bill of sale to them, bill of parcels to us, and acknowledgment, with copy, invoice, and bill of lading; with regard to the *Sylvia*, that is all quite straightforward, no power ever having gone home for her, and no bills drawn on her account, and nothing whatever to interfere with her, except for the cargo, which *Mackay* having drawn for, and the bills being accepted, he would not allow to be used

1852.

McCAlMONT

v.

RANKIN.


1852.  
 McCALMONT  
 v.  
 RANKIN.

used in any way than to go to the party for which it was intended."

The cause came on to be heard before the Vice-Chancellor Sir *James Wigram* on the 23rd *May* 1849, when it was ordered to stand over, with liberty to add parties. On the 9th *August* 1849, and in pursuance of a reference which had been obtained by the Plaintiffs, the Master found, by the admission of all parties, that the *Miracle* was sold on the 28th of *February* 1843, by the firm of *Rankin, Gilmour, & Co.*, under the power of attorney from *John Pollok*, for the sum of 3000*l.*, and that the said sum being the proceeds of the sale, was received by *Rankin, Gilmour, & Co.*, on account of, and the said sum (less 120*l.* charged for commission) was by *Rankin, Gilmour, & Co.*, accounted for to, *Robert Rankin & Co.* Upon this report the cause came on again before the Vice-Chancellor Sir *J. Wigram*, in *January* 1850, and by an order dated the 7th *February* 1850, it was ordered, that so much of the Plaintiffs' bill as sought relief with respect to the ship *Miracle*, and the proceeds thereof, should be dismissed with costs, but such costs were not to be taxed or paid until further order; and as to the rest of the relief sought by the bill, it was ordered, that the bill, so far as not dismissed, should be retained, with liberty for the Plaintiffs to proceed at law touching the matters therein in question, as they should be advised; and in case the Plaintiffs should proceed at law within the time therein mentioned, the Court did reserve the consideration of the residue of the costs of the suit, and of further directions, until after the trial; and certain admissions were directed for the purposes of such trial. Up to this stage the case is reported in the eighth volume of Mr. *Hare's* Reports, page 1.

An action of *assumpsit* was accordingly brought by the  
 Plaintiffs

**Plaintiffs** against the Defendant *R. Rankin*, and upon **that** trial a verdict for the sum of 2023*l.* 2*s.* 4*d.* was **obtained** against the Defendant, being the sum realized **by** him upon the sale of the cargo in the pleadings **men-**  
**tioned.**

1852.  
  
 McCALMONT  
 v.  
 RANKIN.

On the 29th *July* 1851, the cause came on to be **heard** before the Vice-Chancellor *Knight Bruce*, on **further** directions, on the question of costs, when his Honor **ordered**, that *R. Rankin* should within one month pay **to** the Plaintiffs the said sum of 2023*l.* 2*s.* 4*d.*, with **interest** at 4*l.* per cent. from the 3rd *May* 1851, the **date** of the judgment at law. The Plaintiffs now **ap-**  
**pealed** from so much of the decree of the Vice-Chan-  
cellor *Wigram* as dismissed the bill with respect to the **ship** and the proceeds, and from so much of the decree **of** the Vice-Chancellor *Knight Bruce* as limited their **right** to interest on the sum recovered in the action, **from** the date of the judgment.

*Mr. Bethell* and *Mr. Cairns*, for the Plaintiffs.

The law, as it stood under the Acts of 26 *Geo.* III. c. 60, and 34 *Geo.* III. c. 68, was much more stringent in its provisions than the law under the statute 3 & 4 *Will.* IV. c. 55, which was in force when the contract the subject of the present suit was entered into : for instance, under the statute of 34 *Geo.* III. c. 68, no transfer, contract, or agreement for transfer of property in any ship, was to be valid or effectual, for any purpose whatsoever, either at law or in equity, except in the form prescribed by that Act; and by the 26 *Geo.* III. c. 60, the bill of sale, if not according to its provisions, was made void ; whereas no such provisions were to be found in the Act 3 & 4 *Will.* IV. c. 55. Lord *Tenterden* recognises this distinction with respect to executory contracts, *Abbot on Shipping*, p. 83, ed. 7. All the Defendants being af-  
fected



1852.  
 McCALMONT  
 v.  
 RANKIN.

fectured with notice, the transfer is fraudulent, and the power of attorney must, as against them, be assumed to have been irrevocable. Admitting that the statute is a shield so long as the ship remains unsold, yet when sold, the Plaintiffs' equity attaches, and the proceeds of the sale are impressed with a trust in the Plaintiffs' favour, *Davenport v. Whitmore* (a); on the same principle, though an alien cannot hold lands, yet, when converted, he may take the proceeds, *Du Hourmelin v. Sheldon* (b). The case of *Battersby v. Smyth* (c), which will be relied upon by the Defendants, was decided under the old law, and before the 3 & 4 Will. IV. c. 55.

The action at law having given us a right to the cargo, and the form of that action being in *assumpsit*, the jury were precluded under the 3 & 4 Will. IV. c. 42, s. 28, from giving us interest, but the plaintiffs' right being established, the Vice-Chancellor ought to have awarded interest, from the date of the filing of the bill, or at least from the time of the receipt of the proceeds of the cargo.

Sir *W. Wood*, Mr. *Bacon*, and Mr. *J. B. Allen*, *contra*.

The ship being registered in the name of the Defendant *J. Mackay*, his partners could neither assert a legal nor an equitable title to it, *Ex parte Yallop* (d). It was said that the transaction was altogether fraudulent, that the power of sale was irrevocable, and that Messrs. *McCalmont* had a right to have the moneys, whenever and by whomsoever paid; but to give effect to such a contract, would be directly to contravene the express words of the Ship Registry Acts and the uniform current

(a) 2 Myl. & Cr. 177.

(b) 4 Myl. & Cr. 525.

(c) 3 Mad. 110.

(d) 15 Ves. 60.

1852.  
~~McC~~CALMONT  
 v.  
 RANKIN.

rent of authorities, even where there has been fraud, in the ordinary acceptation of the term by this Court. The cases of *Thompson v. Leake* (a) before the statute of 3 & 4 Will. IV. c. 55, and *Follett v. Delany* (b), and *Hughes v. Morris* (c), since the statute, were all cases of fraud, and relief was refused; the present, however, is a mere contest between creditors. The ship was not sold till after the bill was filed, and the argument of the Plaintiffs admits that they had no equity until after the ship was sold. The case of *Prouting v. Hammond* (d) is the only case which gives colour to the plaintiffs' claim, but that decision had nothing to do with evidence of title or with registration; it was founded on the acknowledgment of the defendant.

It is clear that no interest can be awarded by this Court, prior to the date of the judgment; the declaration in the action contained a special count for interest.

Mr. Bethell, in reply.

The LORD CHANCELLOR.

With regard to the question of interest, I am clearly of opinion that this Court cannot give interest, considering the way in which this matter is now brought before it. I give no opinion about the original right to interest. In this case the Vice-Chancellor did not direct an issue, but the Plaintiffs were left to bring such action as they should be advised; and they brought an action for money had and received. It was urged that in that form of action they could not have recovered interest; but it was for them to have considered whether they should not

(a) 1 *Mad.* 39.

(b) 2 *De G. & S.* 235.

(c) *Ante*, p. 349.

(d) 8 *Taunt.* 689.

1852.  
 McCALMONT  
 v.  
 RANKIN.

not have brought an action of trover, if they thought that in the action for money had and received they could not recover interest. This Court, having left the whole question to be decided by a Court of law, and the Plaintiffs having recovered at law all they could recover, they now ask for a supplemental decree to give them that which they allege the form of the action precluded them from obtaining. I am clearly of opinion that I have not any power to give them liberty to bring an action of trover in order to recover interest, which they have not recovered in the action for money had and received.

The principal question is one which is, no doubt, of great importance as regards the operation of the navigation Acts on contracts, although it is somewhat singular it should be raised at this day. [After shortly adverting to the facts of the case, his Lordship proceeded :]—The points which have been contended before me are, first, that this was an agreement which gave to the Plaintiffs a right to the vessel itself; and secondly, if not a right to the vessel, a right to the proceeds of the vessel. I have no hesitation in saying that the Plaintiffs throughout have acted honestly, and that if they do not succeed in getting their money, they have been deluded by the acts of Messrs. *Mackay* of *St. John's* in conjunction with Messrs. *Mackay* of *Liverpool*. This was not a creditable transaction on the part of the Messrs. *Mackay* of *St. John's*—very far from it; for, acting upon the information contained in the letter of the 19th *July* 1841, and after having obtained very large advances from the Plaintiffs, and induced them to believe that proper consignments were in progress to meet such advances, they took upon themselves to revoke in effect the power of attorney, and to alter the destination of the *Miracle* and her cargo from the Plaintiffs into other hands for their separate purposes. That was a dishonest transaction as  
 between

between merchant and merchant. This Court, nevertheless, must proceed upon legal grounds.

1852.

McCAlmont  
v.  
Rankin.

The first difficulty that presents itself in the way of the Plaintiffs is this, that, in order to turn this property into money, and prevent their having the benefit of it, *James Mackay*, who was the registered owner of the vessel in *St. John's*, transferred the vessel to Messrs. *Crane & McGrath*, who are not before the Court. It was insisted that they were mere nominal parties, and that consequently, when they had transferred the property to *Pollok*, who was a partner in *Rankins'* house at *St. John's*, *Rankins* were, in point of fact, the only holders of the ship, and that Messrs *Crane & McGrath*, might be regarded as persons having no real interest. I am clearly of opinion I cannot so consider them. Who the actual purchaser was is not the question which I have to decide, because they were the registered owners, and under the Acts of Parliament that I shall presently refer to, they had the legal title; there is no question but that a large consideration was given by them (whether more or less is not now to be considered) for the purpose of obtaining a transfer of the vessel to themselves. They are not now before the Court, and even assuming that the point of law was in the Plaintiffs' favour, I cannot hear it said in their absence that the sale to them was not a real and bona fide transaction; that, of itself, is a difficulty which, as it appears to me, the Plaintiffs cannot get over.

The Plaintiffs, however, conceding in the argument that the legal and equitable title to the ship duly passed, have insisted that there has been so much fraud throughout the transaction that this Court by its general jurisdiction can follow the proceeds which have been realised by the sale of the vessel, and compel the house of *Rankin, Gilmour & Co.*, who have received such proceeds in this country,

1852.

McCAlMONT  
v.  
RANKIN.

with the knowledge of the Plaintiffs' title, to account for that money. In the first place, I think, supposing even fraud could take the case out of the statute, on which I shall presently observe, that this is not such a case of fraud as can be remedied by this Court as against the ship. I am not now upon the question, whether the proceeds can, upon the doctrine of trusts, be followed. It has never yet been decided that fraud, under circumstances like the present, can be relieved against; on the contrary, the only cases on the subject are cases in which there was fraud in the view of this Court, and yet the parties committing such fraud had no relief given against them, though in respect of other property not affected by positive statutory provisions the Court would have relieved. This transaction was a trick—a contrivance by no means creditable—to prevent the Plaintiffs from having the ship and cargo; one of those tricks and contrivances which I am afraid is too often resorted to in trade, to prevent persons from getting the benefit of securities to which they are morally entitled; but I am clearly of opinion, that this is not such a fraud as I can reach, although it is a transaction which it is impossible for this Court to speak of in any other than terms of reprobation.

In order to consider what relief a person circumstanced as the Plaintiffs might be entitled to, I must glance at the Ship Registry Acts. It has been supposed that under the various Acts which have been passed on the subject, a great difference has existed between actual sales and contracts for sale. The 26th of Geo. III. c. 60 (Lord *Liverpool's* Act), provided in substance, that where property in a ship was transferred, the certificate of registry should be indorsed upon and recited in the bill of sale or other instrument in writing, otherwise it was to be void. The great ob-  
ject

ject was to keep the certificate of registry always in view, so that the devolution of title on the register should show who the real owner of the vessel was. Lord *Eldon*, *In re Warre* (a), states, that Lord *Liverpool* expressed very great surprise when told that his Navigation Act did not include contracts; and because it was not clear that it did, the Act of the 34 Geo. III. c. 68, was passed for the express purpose of including such contracts. The 14th section of that statute, after reciting the 17th section of the former Act, and that doubts had arisen whether by the said provision every transfer of property in any ship or vessel was required to be made by some bill or other instrument in writing, and whether contracts or agreements for the transfer of such property might not be made without any instrument in writing, enacts, "That no transfer, contract, or agreement for transfer of property in any ship or vessel, made or intended to be made after the 1st day of January 1795, shall be valid or effectual for any purpose whatsoever, either at law or in equity, unless such transfer, or contract, or agreement for transfer of property in such ship or vessel, shall be made by bill of sale or instrument in writing, containing such recital as prescribed by the said recited Act." The omission, therefore, was supplied. That Act, however, was repealed by the 6 Geo. IV. c. 105, which repealed several previous Acts. The Act 6 Geo. IV. c. 110, was a new enactment. When that Act was framed the Legislature dropped all mention of contracts or agreements, and made a general provision, by the 30th section, "that when and so often as the property in any ship or vessel, or any part thereof, belonging to any of his Majesty's subjects, shall after registry thereof be sold to any other or others of his Majesty's subjects, the same shall be transferred

1852.

McCAlMONT  
v.  
RANKIN.

(a) 8 Price, 269; see p. 274.

1852.  
 McCALMONT  
 v.  
 RANKIN.

transferred by bill of sale or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel, or the principal contents thereof; otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or in equity." That Act was followed by the 3 & 4 *Will.* IV. c. 55, and the 8 & 9 *Vict.* c. 89, which were in the same words, so far as they related to the subject of transfers of ships. From the 6th *Geo.* IV., therefore, to the present time, in point of fact, contracts and agreements are not referred to specifically; and Lord *Tenterden* in his book seems to suppose that there is on that account a difference before and after the passing of the Act of 6 *Geo.* IV. c. 105. He makes these observations upon the subject of the transfer of property:—"It seems fit to notice a distinction between the recent and the former statutes. A recital of the certificate of registry is not now made necessary to the validity of an executory contract or agreement for the transfer of property, as was expressly required by the 34 *Geo.* III. c. 68, s. 14; neither is an indorsement of such a contract on the certificate now required, which was held to be necessary under that statute; and by the language of the new Acts, if the certificate be not recited in the bill of sale, the transfer shall not be valid and effectual, whereas by the 26 *Geo.* III. c. 60, s. 17, the bill of sale was made void:" *Abbot on Shipping*, p. 83, Ed. 7. He supposes, therefore, that contracts may still exist, but that the new Acts since those of 6 *Geo.* IV. do not touch them. I cannot but think that it would be a most extraordinary proceeding on the part of the Legislature if, having in the first instance passed a general law which did not touch contracts, and then on finding that they had missed their point having expressly by another Act included contracts, they should, when repealing the 34 *Geo.* III. c. 68, and several other Acts, with the view of consolidating and improving

improving the law, make a general provision, the effect of which would be to exclude such contracts.

1852.  
 McCALMONT  
 v.  
 RANKIN.

I see, in the case of *Hughes v. Morris* (a), lately before the Lords Justices, Lord *Cranworth* supposed that Lord *Tenterden* meant that an action at law might still be maintained upon a contract for the sale of a ship, which would have been void under the law as it stood before the statutes of *Geo. IV.*; and he observes that it might be so, without expressing any opinion upon the point. I think it is perfectly clear that the Acts now existing do relate to contracts, because they relate to every disposition: "that when and so often as the property in any ship or vessel," &c.; otherwise "the said transfer shall not be valid or effectual for any purpose whatever, either in law or in equity." What can be plainer? What is the subject of sale? A chattel; a ship. No particular form of words is necessary for the transfer. A bought and sold note, any instrument which shows that one person parts with, and that another person is to acquire the property, will suffice. The words, "I contract with you to sell and let you have the ship *Miracle* at 4000*l.*, to be paid to-morrow or to be paid down," constitute a perfectly good transfer of the ship, provided the terms of the Ship Registry Acts are complied with. But to suppose that contracts are left out of the operation of the existing Acts, appears to me perfectly irreconcilable with the language of their provisions; the words are, "That when and so often as the property in any ship, &c., shall be sold." Is not the property in a ship sold by contract? The Plaintiffs' construction, however, might lead to such a result as this. There might be a contract, and an actual transfer with the consideration paid, but invalid only by reason of

(a) *Ante*, p. 349.




1852.  
 McCALMONT  
 v.  
 RANKIN.

of a non-compliance with some of the forms prescribed by the statutes, although the statutes say such transfers shall not be valid or effectual for any purpose whatever either in law or in equity ; yet, according to the Plaintiffs' contention, the contract is to operate in equity as transfer, and to give a right to relief. I apprehend the true construction of the statutes of the 3 & 4 *Will.* IV c. 55, and 8 & 9 *Vict.* c. 89, to be, that no contract can be valid unless it complies with the conditions prescribed in those Acts. The Legislature, as it appears to me, did not by the recent Acts abolish or repeal the law as regards the regulation of contracts, but it continued in a general form the same regulations as to contracts which had theretofore been imposed ; and I think those general terms are sufficient, so as to require that every contract shall be registered in compliance with the Acts (a). There are many provisions in the Acts which show clearly as it appears to me, that the doctrine of notice was not to have the slightest operation ; for it will be found, that when there are successive sales, and they are entered in the book of registry within a given number of days which must elapse before each transfer is registered and two or more are thus on the registry, the person first bringing the certificate shall have a right as against all other persons who are even prior to him on the registry. The book of registry cannot be referred to by a second or subsequent transferee, without seeing that there was upon the registry of the particular vessel the record of the previous transfers ; yet that will not affect him at all. It is a mere question in the race, whether the first

(a) On the 24th *July*, the Lord Chancellor observed that he might have expressed himself too strongly on the subject of the invalidity of the contract at law ; he did not intend to

say that there might not be a remedy by action at law for the consequences of a breach of the contract, but only that there could be no equitable relief on the contract.

first brings the certificate of registry, to have the particulars of the bill of sale, or instrument under which he claims the property, indorsed upon it. The whole frame of the Acts negatives any equity arising out of the doctrine of notice. I apprehend, the true rule of construction both in law and equity is, that in order to have a good title, you must have an effectual transfer at law. If you have an effectual transfer at law, it is just as effectual in equity.

1852.  
  
 McCALMONT  
 v.  
 RANKIN.

There are very few cases bearing on the point which has been argued before me. The question of fraud, which was raised before Lord *Eldon* assisted by Sir *W. Grant* in *Mestaer v. Gillespie* (a), was not decided, though an issue was directed. Lord *Eldon*, in the subsequent case of *Speldt v. Lechmere* (b), though he took occasion to observe that the point was not determined in *Mestaer v. Gillespie*, yet gave no new opinion on the subject. He never in any one case laid it down, that fraud itself would be an exception. I am not on the present occasion called upon to lay down such a proposition, but of this I am perfectly clear, that, so far as the authorities have gone, there have been cases very much like fraud, and yet no relief has been given.

The cases of *Newnham v. Graves*, and *Barker v. Chapman* (c) were both heard before Sir *William Grant*. In the former case it appeared that *Dawson* and his partner assigned to *Bland* and his partner a ship by a proper bill of sale. The ship was then at sea, and before her arrival in *London* both parties became bankrupt, and upon her arrival in *London* the Plaintiffs, who were the assignees in bankruptcy of *Bland*, immediately afterwards took actual possession of the ship, and applied

(a) 11 *Ves.* 621.

(b) 13 *Ves.* 588.

(c) 1 *Mad.* 399, in *notis.*

1852.  
 McCALMONT  
 v.  
 RANKIN.

plied to the captain for the certificate of registry, to get it indorsed within ten days after the arrival of the ship, as required by the Act 34 Geo. III. c. 68; but the captain, acting in collusion with the assignees of *Dawson*, who had also become bankrupt, delivered it to them. The Master of the Rolls was of opinion that the Registry Acts precluded the Court from giving any relief, and dismissed the bill; so that there the representatives of the sellers, though they could stand in no better situation than the sellers themselves, by collusion with the captain got possession of the certificate and so precluded the representatives of the purchaser from making good their title.

The other case of *Barker v. Chapman* is referred to by Sir *T. Plumer*, in the case of *Thompson v. Leake* (a), in the following terms: "Where there was a gross fraud by preventing the ship's register from being indorsed within the time prescribed by the Act of Parliament, after the return of the ship, his Honor the Master of the Rolls, with much reluctance, and after a year's delay of his judgment, in hopes the parties would agree to a compromise, decided he could not relieve. There was no appeal from that determination; it is therefore a considerable authority. It is the only express decision that fraud is not in these cases relievable." That was the doctrine which Sir *T. Plumer* himself was inclined to hold in *Thompson v. Leake*, when he refused to relieve in that case, upon the ground either of accident or fraud. The last case to which I have referred goes to some extent, although not to the whole extent of refusing relief even where fraud was shown to exist; but all the cases, so far as they have gone, have decided against relieving under circumstances which would be termed fraudulent in the ordinary

(a) 1 *Mad.* 39; see p. 44.

ordinary acceptation of the word in this Court; I am not prepared, nor am I called upon on the present occasion to say, that there may not be such a case of actual gross fraud as would enable this Court to give relief.

1852.  
McCAlmont  
v.  
Rankin.

It was clearly laid down by Lord *Eldon*, in *Speldt v. Lechnere* (a), that while the express clause as to contracts stood in the Act (34 Geo. III. c. 68), that "if the transfer was not in the mode prescribed by the Act, the whole was void;" he could give no relief upon the contract, though it was a *bonâ fide* contract, and the consideration was paid, if the Registry Acts were not complied with. Assuming that to be the law, and coupling that with the observations of Lord *Eldon* in *Ex parte Yallop* (b), the result, I think, clearly is, that when the contract is void at law, there can be no relief in equity. That may be laid down as a general rule. I do not say that it may not admit of exception.

I have already expressed my opinion that there is no actual fraud in the case before me, and therefore, upon the mere ground of fraud, I cannot give any relief as against the registry. Assuming the contract to be clearly made out as regards the intended destination of the ship to the Plaintiffs, still I think it is one of those contracts which, according to the authorities to which I have referred, this Court cannot enforce. In the case of *Brewster v. Clarke* (c), there was a clear agreement for the sale of a ship, yet it was held to be void for want of the certificate being duly recited in the memorandum of sale, though a copy of such certificate was annexed thereto. Here the power of attorney for sale and the letter that passed are supposed to make the contract, but they are wholly informal.

I am

(a) 13 *Ves.* 588.

(b) 15 *Ves.* 60, see p. 67.

(c) 2 *Mer.* 75.

1852.  
 McCALMONT  
 v.  
 RANKIN.

I am of opinion that the Acts in force when this transaction took place applied to contracts ~~que~~ contracts, just as much as the Act 34 Geo. III. c. 68, expressly applied to contracts, the provisions of which, though the Act itself were repealed, I think were intended to be carried over and given effect to by the subsequent Acts. Contracts, then, relative to the transfer of ships, requiring all the same formalities as any other transfer,—registration, a recital of the certificate of registry in the instrument of transfer, and the indorsement upon the certificate,—I must necessarily hold that this was a contract that could not operate in this Court to bind the ship in any manner. As a transfer, it is void both in law and equity.

It was contended before me, as it was in the case of *Hughes v. Morris* (a), that the contract to transfer as in ordinary cases in this Court, is equivalent to an actual transfer of the property, but the moment such a proposition is enunciated, it is obnoxious to the rule provided by the Ship Registry Acts, which destroys its effect, both at law and in equity. I think, therefore, I am entirely precluded from giving any relief as regards the transfer of the ship itself.

Then it has been most elaborately argued, that I might and ought to give effect to the transaction as regards the proceeds of the vessel, although I cannot affect the vessel itself. I do not lay down any rule, that parties cannot authorize a ship to be sold, and direct in what manner the money shall be applied. That is quite a different question. But the question before me is this: the Plaintiffs claim the right under certain documents, which they say vest the property of the vessel in them,

(a) *Ante*, p. 349.

them, but for the Ship Registry Acts; and being forced to ~~relinquish~~ such right to the vessel, they say they have an equity to that which represents the vessel, namely, the price produced by the sale of the vessel, and that a Court of equity is bound to give effect to that claim. Can this Court give any relief as regards the proceeds of property which could not be given as against the property itself? There may be cases put with regard to other transactions in which the Court would follow the money, and would not follow the property, but I think the right of the money here must spring out of the right to the vessel. The right, if there was any right created, was to the vessel, for the consignment was of the vessel, and the vessel, by its proceeds, no doubt was to pay its debts; but before effect was given to that inchoate right, before it ever ripened into a perfect contract,—and while it was pending,—the party who was in the act of giving effect to it chose to prevent it from becoming a legal and binding contract. If it does not become a legal binding act, how can equity fix upon the proceeds of property, which by law has not become liable, and which in fact legally belongs to somebody else? Suppose, for example, the Defendants had now got the ship, and if, as is admitted, they would be entitled to retain her as long as she endures, or to make firewood of her if they please, and the Plaintiffs never could enforce their claim, it would be singular indeed, that though the property could be held in defiance of the rightful owner, and that no equity existed as regarded the property so long as it was kept in specie, yet that the moment that property was converted into money, the money might be demanded by the Plaintiffs. What is that but indirectly breaking in upon the provisions of the Ship Registry Acts, and giving the Plaintiffs a right or property in the vessel, though they cannot have the vessel itself? Those Acts intended that the property  
in

1852.  
McCAlMONT  
v.  
RANKIN.

1852.

McCAlMONT

v.

RANKIN.

in the vessel should go hand in hand with the right to the vessel, and that he who had the vessel should have also an equitable right to the property in the vessel. The cases, if it were necessary to go into them, would prove that. My clear opinion therefore is, that the property in this ship did not pass to the Plaintiffs while it was in specie, and that being so, that the contract under the documents which have been produced does not give them the title which they now assert to the proceeds of that property.

If this case had not been elaborately considered in the Court below, where it underwent so much and such great consideration, I so much disapprove of the conduct of the house of Messrs. *Mackay of St. John's*, that I should not dismiss the appeal with costs; but as the case was so fully considered, and as I think the Court came to a right determination in point of law, I cannot help dismissing this appeal with costs.

---

1852.

THE CORPORATION OF ROCHESTER v. LEE.

July 21, 22.

**T**HE present was an appeal on the part of the Plaintiffs, from so much of an order of the Vice-Chancellor *Knight Bruce*, pronounced on further directions on the 28th July 1851, as declared that the Court did not think fit to make any order as to costs of this suit or the action at law between the Plaintiffs and the Defendant up to that time. The following are the circumstances out of which this appeal arose:—On the hearing of this cause on the 9th February 1847, at the request of the Defendant, the following issue was directed by the Vice-Chancellor *Knight Bruce*:—Whether the corporation, as the owners of the port of the city of *Rochester*, were, on the 7th day of August 1845 (the date of the filing of the bill), lawfully entitled to demand and receive the toll or duty in question upon every ton of coal brought by water to and unloaded within the port, for the weighing or being ready to weigh the same? And if the jury should find any special matter, it was to be indorsed on the postea.

Before *The Lord Chancellor* LORD ST. LEONARDS.

As a general rule, where a Plaintiff's title to equitable relief depends on a legal right, on the establishment of such right, either by an action or an issue, he will be entitled to the costs both at law and in equity.

After an issue had been directed and found in favour of the Defendant, the Plaintiff applied for a new trial,

The

which was refused; the cause was then brought to a hearing, when the bill was dismissed with costs. The Plaintiff then appealed from the decree, as well as the order refusing the new trial. On that appeal the bill was retained for a year, with liberty for the Plaintiff to bring an action. An action was accordingly brought, and a verdict was found in the Plaintiff's favour; but a new trial of the action was subsequently granted, on the ground of misdirection of the Judge. The Plaintiff having been successful in the second action, the cause was brought before the Vice-Chancellor *Knight Bruce*, on the equity reserved, when he made a decree in conformity with the result of the trial at law, but did not think fit to make any order as to costs: *Held*, on an appeal from that decree, that the appeal involved so much of principle as to render it an exception to the ordinary rule, which prohibits an appeal for costs alone.

Under the circumstances of this case, *Held* that the Plaintiff was not entitled to the costs of the issue, nor of the first trial of the action, nor of so much of the costs of the suit as was occasioned by his having brought the cause to a hearing without appealing from the order refusing the new trial of the issue, but that he was entitled to all the other costs.



1852.  
 THE CORPO-  
 RATION OF  
 ROCHESTER  
 v.  
 LEE.

The issue was tried, when the verdict was, in effect that the Plaintiffs were not owners of the port of the city of *Rochester*, nor were they entitled on the 7th *August* 1845, &c. [following the terms of the issue] but there was an indorsement in the postea that the Plaintiffs were entitled to the payment in question upon all coals brought by water and unloaded within the said city and the liberties thereof, for sale only.

On the 8th *May* 1848, the Plaintiffs moved, before the Vice-Chancellor *Knight Bruce*, for a new trial, but the motion was refused, and the costs were directed to be costs in the cause. On the 28th *June* 1848, the cause came on to be heard on further directions, when his Honor dismissed the bill without prejudice to any question, except, &c. (proposed by the issue), and the costs of the suit and issue were directed to be paid by the Plaintiffs.

The Plaintiffs appealed to the Lord Chancellor (Lord *Cottenham*) from the orders of the 8th *May* 1848, and 28th *June* 1848; and on the 23rd *November* 1849 his Lordship being of opinion that Plaintiffs' title depended more on question of legal presumption than on any disputed fact, and not being perfectly satisfied with the result of the trial, discharged both the orders appealed from (a), and made an order retaining the bill for a twelvemonth, with the liberty for the Plaintiffs to bring an action, although the original decree directing the issue was not appealed from. In pursuance of Lord *Cottenham's* order, the Plaintiffs brought an action of debt against the Defendant, in which action the jury, on the 22nd *March* 1850, returned a verdict in favour of the Plaintiffs upon all the issues. A rule for a new trial having

(a) 1 *Mac. & G.* 467.

having been subsequently obtained and made absolute, the action was again tried; and on the 24th *March* 1851, a similar verdict in the Plaintiffs' favour was returned on all the issues. On the 28th *March* 1851, the cause came on to be heard before the Vice-Chancellor *Knight Bruce*, on the equity reserved by Lord *Cottenham's* order, and upon the matter of costs, when his Honor made a declaration in the terms of the affirmative of the issues as originally directed; and on the Defendant's submitting to account on that footing, made the order as to costs, which formed the subject of the present appeal.

1852.  
THE CORPO-  
RATION OF  
ROCHESTER  
v.  
LEE.

Mr. *Russell* and Mr. *W. D. Lewis*, in support of the appeal.

This is an appeal in respect of costs alone, but within one of the recognised exceptions, being on a question of principle, *Owen v. Griffith (a)*, *Burkett v. Spray (b)*, *Taylor v. Southgate (c)*, *Angell v. Davis (d)*. The Plaintiffs have succeeded in every object of the suit, which being a bill of peace, the costs of the action at law ought to have been awarded by the Vice-Chancellor, *Clifton v. Orchard (e)*, *Codrington v. England (f)*, *Blackburn v. Gregson (g)*, *White v. Lisle (h)*, *Beardlock v. Tyler (i)*. The error of which the Plaintiffs complain is apparent on the face of the decree, and as its correction does not involve a rehearing of the cause, it follows that the error may be set right on the present appeal, *Chappell v. Purday (k)*.

Mr. *Wigram* and Mr. *Shapter*, for the Respondent.

This

- (a) 1 *Ves.* 250.
- (b) 1 *Russ. & M.* 113.
- (c) 4 *Myl. & Cr.* 203.
- (d) 4 *Myl. & Cr.* 360.
- (e) 1 *Atk.* 610.

- (f) *Barnard*, 436.
- (g) 1 *Bro. C. C.* 420.
- (h) 3 *Swanst.* 342.
- (i) *Jacob*, 571.
- (k) 2 *Phil.* 227.

1852.  
 THE CORPO-  
 RATION OF  
 ROCHESTER  
 v.  
 LEE.

This was an appeal purely on account of costs, and being a matter on which the Vice-Chancellor has exercised his discretion, after taking all the circumstances of the case into consideration, this Court will not interfere. It was said that the bill in this case was a bill of peace, and that the right of the Plaintiffs being established at law, the costs ought to follow the result; it was not, however, a bill of peace, as there was only one Defendant; but assuming that it was, still the Plaintiff had not established their claim as originally laid in the bill, and there was no appeal from the decree directing the issue, nor was the issue itself disturbed.

Mr. *W. D. Lewis*, in reply.

*The LORD CHANCELLOR.*

I think that this is a case falling within the description of cases in which an appeal for costs is admissible. Generally speaking, there is no doubt that costs must abide the event of a bill of this nature, which is to establish a prescriptive right, and such right being established at law in the Plaintiffs' favour, it follows that the costs of the trial ought to have been made payable by the Defendant; the present, however, is a case of very peculiar circumstances. When this suit was first heard an issue was directed, and found in the Defendant's favour; the corporation applied for a new trial, which was refused; and instead of appealing immediately from that order refusing their application, they proceeded to have the cause heard on further directions; and it was not until a decree had been made directing the dismissal of the bill, and as a necessary consequence with costs, that they appealed from the order refusing a new trial of the issue, and they appealed at the same time from the decree.

It

1852.

THE CORPO-  
RATION OF  
ROCHESTER  
v  
LEE.

It is to be observed that Lord *Cottenham* did not reverse, though he varied the decree of the Vice-Chancellor, dismissing the bill; but he left the Plaintiffs at liberty to bring an action. Now, although the same question might be tried and decided in an action as upon an issue, yet leaving a party to bring an action is very different from granting a new trial of an issue: in the one case the Court loses its power over the proceedings at law, and in the other it retains such power. The result of the trial of the first action was in favour of the corporation, but miscarried from the misdirection of the Judge. There was consequently another trial, and on that trial the corporation again established their claim. The cause then came before the Vice-Chancellor who made the original decree: he found the matter balanced—he had approved of the conclusion of the jury upon the issue, which was also approved of by the learned Judge before whom it was tried. Finding that of which he approved, opposed to the subsequent findings of the jury in the two actions, of the verdicts in which he disapproved, he was placed in a difficulty, which does not occur to me, in dealing with the costs.

Under the particular circumstances, therefore, to which I have referred, I am of opinion the justice of the case will be met by giving no costs of the issue, which was found in favour of the Defendant, and which in truth has never been properly disturbed, as there has been no new trial of that issue. I think also that there should be no costs of the hearing on further directions, because the corporation should have come at once upon appeal for a new trial of the issue, and should not have put the parties to the expense of that hearing upon further directions. I think moreover, that there should be no costs of the trial which failed by the misdirection of the Judge; for that neither party is properly answerable. Subject to

VOL. II.

F F

D. M. G. these

1852.  
 THE CORPO-  
 RATION OF  
 ROCHESTER  
 v.  
 LEE.

these three exceptions, I am of opinion that the Plaintiffs are right in their contention, and that the order of the Vice-Chancellor must therefore be varied so that the Plaintiffs shall have the costs of the last trial, and generally of this suit.

July 22, 23.

ADEY v. ARNOLD.

Before The  
 Lord Chan-  
 cellor LORD  
 ST. LEON-  
 ARDS.

A breach of trust will constitute merely a simple contract debt, unless there is something in the creation of the trust to raise a liability on covenant against the trustee.

THIS was an appeal by one of the Defendants, *William Arnold*, who had been a co-trustee with the testator *Thomas Arnold* of a certain indenture dated the 29th September 1803, being the marriage settlement of Mr. and Mrs. *Annesley*, from so much of a decree made by the Vice-Chancellor Lord *Cranworth* on further directions, and bearing date the 26th July 1851, as declared that the estate of *Thomas Arnold* was liable to make good a sum of 1970*l.* 18*s.* 6*d.* produced by the sale of 2095*l.* 6*s.* 9*d.* Bank Three Pounds per Cent. Annuities subject to the trusts of the indenture, and that this liability was to be treated as a simple contract debt due to the persons beneficially interested under the trusts of the indenture, and not as a specialty debt as had been found by the Master to whom the cause had on the hearing been referred.

The suit, which was instituted in August 1844, was a creditors suit for the administration of the estate of *Thomas Arnold*, who died on the 7th February 1844. The present Appellant, who was one of the executors of *Thomas Arnold*, by his answer stated that he was induced by the testator to accept conjointly with him the office of trustee under the marriage settlement of *Marcus John Annesley*, Esq. and *Frances Charlotte* his wife, for whom the testator also acted as solicitor; that

that afterwards he, the Defendant, being desirous of resigning his office of trustee of such settlement, before any new trustee was appointed of the funds subject thereto was induced by the testator, on a memorandum directing him so to do signed by *M. J. Annesley* and *F. C. Annesley*, to execute a power of attorney for the receipt of the dividends and the transfer of the fund subject to the trusts of the settlement, and that the same was under such power of attorney transferred into the sole name of the testator, who afterwards sold the whole of the fund and applied the proceeds thereof to his own purposes : the Defendant submitted that he was entitled to be indemnified out of the estate of the testator against all liabilities to which he had become subject by reason of this sale and appropriation, in priority of all the other creditors of the testator.

1852.  
ADEY  
v.  
ARNOLD.

By the decree made on the hearing of the cause on the 14th *July* 1845, it was referred to the Master to inquire and state to the Court under what circumstances the power of attorney above mentioned was executed by *William Arnold*.

The Master by his report dated the 27th *July* 1847, found the trusts of the indenture in question vesting in *F. Smith* and *W. Smith* the share to which Mrs. *Annesley* would become entitled under the will of *F. Smith* deceased, such trusts being chiefly for the benefit of Mrs. *Annesley* and her issue ; that *T. Arnold* the testator was the solicitor of Mr. and Mrs. *Annesley*, and that on the 5th *February* 1841 he wrote to *W. Arnold* asking him to be a trustee jointly with him of a sum of 2000*l.* to which Mrs. *Annesley* had become entitled ; that *W. Arnold* complied with this request, and that an indenture dated the 6th *April* 1841, previously approved by the Master to whom certain suits

1852.

ADEY  
v.  
ARNOLD.

for the administration of the estate of *F. Smith* were referred, was indorsed on the former indenture reciting the several proceedings in the last-mentioned suits and a report of the Master finding that *F. Smith*, the surviving trustee of the settlement of the 29th September 1803 (*W. Smith* being dead) ought to be discharged from being a trustee and *T. Arnold* and *W. Arnold* to be substituted as trustees of the settlement, and witnessing that under the power for that purpose contained in the articles, Mr. and Mrs. *Annesley*, with the consent of *F. Smith*, *T. Arnold*, and *W. Arnold*, substituted and appointed *T. Arnold* to be a trustee in the stead or place of *W. Smith*, and *W. Arnold* to be a trustee in the stead or place of *F. Smith*. The Master also found that in pursuance of an order made in the last-mentioned suits, 2095*l.* 6*s.* 9*d.* Bank Three Pounds per Cent. Annuities was transferred into the names of *T. Arnold* and *W. Arnold*; that in January 1842, *T. Arnold* sent to *W. Arnold* a power of attorney to authorize the receipt of the dividends then due or thereafter to accrue due on the stock; that a good deal of communication took place between *T. Arnold* and *W. Arnold* as to the power, *W. Arnold* being unwilling to execute it, and that, although he did at last execute it, the power was never acted on in consequence of an informality attending the execution; that in September 1842, *T. Arnold* presented to *W. Arnold* another power of attorney for his execution, authorizing the sale of the stock, and at the same time delivering to him the following request in writing:—"To *William Arnold*, Esq.,—You having signified your desire to resign the trusteeship to which you have been appointed under the deed of settlement made between us the undersigned *Marcus John Annesley* and *Caroline Frances Annesley*, we therefore do hereby agree to exonerate and discharge you from all responsibility in respect of the said trusteeship by you undertaken

taken jointly with your co-trustee, provided you shall in due course execute a power of attorney for the receipt of the dividends now overdue, and to transfer the fund so invested in your joint names to your co-trustee Mr. *Thomas Arnold* of *Poole* solicitor, who will then become sole trustee, so that the fund may be dealt with according to the trusts of the said settlement. Dated this 9th day of *August* 1842.—*Marcus J. Annesley, Caroline F. Annesley*.—Witnesses to the signature of *Marcus John Annesley* at *Poole* this day, *Thomas Arnold, A. Hawes*.—Witness to the signature of *Caroline Frances Annesley* at *Guernsey, M. Arnold*;" that *W. Arnold* thereupon executed the power, and the fund was shortly afterwards transferred into the name of *T. Arnold* alone, and was subsequently sold out and the proceeds of the sale received by him.

1852.  
ADEY  
v.  
ARNOLD.

The suit came on for further directions on the 29th *June* 1848, when it was referred to the Master to inquire (among other things) whether the estate of the testator was indebted or liable to any and what amount in respect of the 2095*l.* 6*s.* 9*d.* Bank Three Pounds per Cent. Annuities found to have been sold by the testator, and whether the same constituted a debt or liability by specialty or on simple contract only, with liberty to state special circumstances.

The Master, by his report dated the 31st *May* 1850, found that the sale of the 2095*l.* 6*s.* 9*d.* Bank Three Pounds per Cent. Annuities and appropriation of the proceeds thereof, was a breach of trust on the part of the testator *Thomas Arnold*; that he thereby became liable and bound to replace the same annuities, and was liable so to do under the deed of the 6th *April* 1841, and that his estate was indebted or liable to the amount of 1970*l.* 18*s.* 6*d.* sterling in respect of the said 2095*l.* 6*s.* 9*d.* Bank



1852.  
ADEY  
v.  
ARNOLD.

Bank Three Pounds per Cent. Annuities, and that the same constituted a debt and liability by specialty. It was on this finding that the present question arose.

The Vice-Chancellor, on the suit coming on for subsequent further directions on the 26th *July* 1851, reversed the decision of the Master, and held, in favour of the Plaintiff on behalf of the creditors of *Thomas Arnold* that the debt or liability was a simple contract debt only. From this decision *W. Arnold* now appealed to the Lord Chancellor.

Mr. *Willcock*, Mr. *Malins*, and Mr. *Osborne*, for the appeal.

They submitted that the finding of the Master was right, and cited the following cases as authorities holding that the sum in question, though due in respect of a breach of trust, was a specialty debt; *Gordon v. Manley* (a), *Benson v. Benson* (b), *Plumer Marchant* (c), *Randall v. Lynch* (d), *Lord Montford* *Lord Cadogan* (e), *Mavor v. Davenport* (f), *Turner Wardle* (g), *Wood v. Hardisty*, (h).

Mr. *Teed* and Mr. *Webb* supported the decision of the Vice-Chancellor.

They argued that the general rule was against the contention of the Appellant, and that the cases cited were exceptions depending as to each on its own special circumstances, such as there having been an acknowledgment of the debt by the party sought to be charged. Besides commenting on the cases before cited, they mentioned, *Vernon v. Vawdry* (i), *Parker v. Young* (k).

(a) *Cas. temp. Talbot*, 109.

(b) 1 *P. W.* 130.

(c) 3 *Burr.* 1380.

(d) 12 *East*, 179.

(e) 19 *Ves.* 635.

(f) 2 *Sim.* 227.

(g) 7 *Sim.* 80.

(h) 2 *Coll.* 542.

(i) 2 *Atk.* 119.

(k) 6 *Beav.* 261.

Mr. *Stuart* appeared for the residuary legatee of *Thomas Arnold*, but the Lord Chancellor held that he was **not** entitled to be heard.

1852.  
ADEY  
v.  
ARNOLD.

Mr. *Willcock* replied.

*The LORD CHANCELLOR.*

There is no great difficulty in this case. As a general proposition, it is clear that a breach of trust does not constitute a specialty debt, *Vernon v. Vawdry* (a), *Cox v. Bateman* (b); but it is also clear, that, where there has been a deed declaring the trusts amounting to a covenant, as Lord *Eldon* said in *Lord Montford v. Lord Cadogan* (c), and where there has been a debt by means of the trustee having money in his possession and applying it contrary to the manner in which under his hand he has covenanted to apply it, in such a case the liability has been held to be a specialty debt.

The Court will not, however, raise a covenant without necessity, as may be seen from the case of *Bartlett v. Hodgson* (d): that was an action of debt on a bond brought by a creditor of *Peter Holme* against his heir-at-law: it appeared that *Peter Holme* and another were parties to the Defendant's marriage settlement, by which all her personal property was assigned to them upon certain trusts for her benefit: the deed contained a clause, "that the trustees should not be chargeable with or accountable for any money arising in execution of the said trusts, but what the person or persons so to be accountable should actually receive:" *Peter Holme*, his co-trustee being dead, received money, part of the trust property, which he did not apply according to the

(a) 2 *Atk.* 119.

(b) 2 *Ves.* 19.

(c) 19 *Ves.* 635.

(d) 1 *T. R.* 42.

1852.  
 ADEY  
 v.  
 ARNOLD.

the trusts: under these circumstances the Defendant pleaded *plenè administravit*, claiming as against the Plaintiff to retain the amount out of the assets: it was insisted, not that a specialty debt arose from the declaration of trust, but that it arose from the words discharging the trustees, which it was contended expressly bound each trustee and his heirs for what he should actually receive: Lord *Mansfield* however said, "This is a common clause of indemnity which is inserted in all settlements: the sense of it is this, that the trustees and their heirs shall not be accountable for more than they receive; they are accountable for what they actually receive, but not as under a covenant:" and Mr. Justice *Ashurst* added, "It is not a clause of charge, but rather of discharge and indemnity; it is to take away that responsibility which each would be under for the acts of the other were it not for this clause."

It does not seem to have occurred to any one in the case just referred to, that the mere assignment in trust would create a specialty debt: that, however, is the only point here, for on looking at the deed, which is a simple transfer from the old to the new trustees, I can find no words on which to raise a declaration or agreement amounting to a covenant: there is an obligation to perform certain trusts, which Equity will enforce, but nothing on which to ground an action of covenant. This Court will enforce a trust, but only *quà* trust, and only so far as to make it fall within the rule which constitutes the claim under it a simple contract debt. I take then the present to be a clear case; and that, without disturbing the authorities, there being in the deed no words to raise a covenant, the sum claimed can only be regarded as a simple contract debt. The appeal must therefore be dismissed.

1852.

In the Matter of FAWCETT'S PATENT.

April 16,  
June 12,  
July 17.

Before *The*  
*Lord Chan-*  
*cellor* LORD  
ST. LEON-  
ARDS.

**I**N this case the object of the petition was to obtain the sealing of the Petitioner's patent, notwithstanding the caveat, which had been entered by the Respondents. The ground on which the application was made was, that the subject-matter of the patent had been duly referred to the Attorney-General; that he had signed his report in favour of the application, after the usual notice had been given to all persons who had caveats; that the Queen's bill, the signet bill, and the privy seal bill (a), had been duly obtained without opposition, and that it was not till after the privy seal bill of the Petitioner's patent had been left at the Lord Chancellor's great seal patent office for the purpose of being sealed, that the opposition of the Respondents was raised.

Where a caveat was lodged before the great seal was affixed to a patent, the Lord Chancellor declined to enter into the merits of the opposition, but referred the matter back to the Attorney-General.

Mr. *Daniel* and Mr. *Wodehouse*, for the Petitioner, submitted that it was not competent for a party to lie by and oppose the grant of a patent at the last stage.

Mr. *Campbell*, Mr. *Selwyn*, and Mr. *T. Webster*, *contra*.

The practice of the Court in such cases is, to refer the matter back to the Attorney-General, and to give the same force to the opposition, if raised the day before the great seal is sought to be affixed to a patent as if at the first stage. They referred to *In re Alcock's Patent* (b), and to three other unreported cases, to show that, according to the present practice of the

(a) By the Act 14 & 15 Vict. c. 82, the necessity for obtaining the Queen's bill, signet bill, and

privy seal bill is dispensed with.  
(b) 10th December 1832 not reported.

1852.  
 {  
*In re*  
 FAWCETT'S  
 PATENT.

Court, the matter must be again referred to the Attorney-General.

Mr. *Daniel* in reply, cited *Ex parte Fox* (a).

*The* LORD CHANCELLOR.

I cannot take upon myself the duty of entering into an examination of the merits of rival specifications in Court. Lord *Eldon* seems to have done so in *Ex parte Fox*, but a more inconvenient practice I cannot well conceive. If there was any danger of stopping the Petitioner's application by my not entering into the merits, I might hear the case myself; but I can see no such ground. Under these circumstances I will not act in opposition to the four authorities which have been cited: nor am I inclined to interrupt the general business of the suitor by introducing a very mischievous practice, and one which would lead parties to delay entering their caveats for the mere purpose of compelling the Lord Chancellor to hear the merits.

I shall send this case back to the law officer of the Crown, with a direction that it may be proceeded with as expeditiously as possible, giving leave to the Petitioner to apply to me if there should be any unreasonable delay in the prosecution of this order. The costs of all parties to be reserved.

July 17.

On this day the matter was again mentioned as having been compromised.

---

(a) 1 V. & B. 67.

1852.

NAVULSHAW v. BROWNRIGG.

July 22, 24.

**T**HIS was an appeal by the Plaintiff from the decision of the Vice-Chancellor Lord *Cranworth*, dismissing the Bill with costs. The facts of the case and the arguments are very fully given in the report of the hearing before the Vice-Chancellor in the 1st Volume of Mr. *Simons'* Reports (New Series), page 573; and the following statement, which is necessary in order to render the judgment of the Lord Chancellor intelligible to the reader, is taken from that report.

Before *The Lord Chancellor* LORD ST. LEONARDS.

Under the Factors Act, 5 & 6 Vict. c. 39, a contract with an agent for the pledge of goods will be valid as against the principal, though the person dealing with the agent knows him to be only an agent in respect of the goods pledged, provided that the person so dealing acts *bonâ fide* and without notice that the agent is acting *malâ fide* and beyond his authority.

In *March* 1847, the Plaintiff, a merchant in *India*, shipped two boxes of pearls, and consigned them to the Defendants Messrs. *Brownrigg & Co.*, of *Liverpool*, for sale on his account. Shortly before the pearls arrived in *England*, Messrs. *Brownrigg & Co.* informed the Defendants Messrs. *Collet & Co.*, their *London* correspondents, that they expected to receive a parcel of pearls from *India* for sale; and Messrs. *Collet & Co.* at their request made some inquiries as to the state of the market for pearls, and communicated the result to them. The pearls arrived in *May* 1847, and on the 26th of that month Messrs. *Brownrigg & Co.* sent them to Messrs. *Collet & Co.* to get them valued: the amount of the valuation was 2050*l.* After the valuation had been made, Messrs. *Brownrigg & Co.* instructed Messrs. *Collet & Co.* to cause the pearls to be sold, and requested those gentlemen

To deprive the pledgee of the protection of the Act, he must be fixed with knowledge

that the agent is so acting as above stated, and no mere suspicion will amount to notice; nor will the knowledge that the agent has power to sell the goods constitute notice that he has not power to pledge them.

A bill for an account by a principal against his agent is not necessary where the transaction to which it relates is a single transaction and untainted by fraud.

1852.  
 NAVULSHAW  
 v.  
 BROWNRIGG.

men to accept a bill for 2000*l.* on the security of them, which Messrs. *Collet & Co.* did. Before that transaction took place, Messrs. *Brownrigg & Co.* had accepted bills drawn by the Plaintiff against the pearls to the amount of 2466*l.*; but Messrs. *Collet & Co.* did not know that they had done so until several months afterwards, nor were those gentlemen informed when they accepted the bill for 2000*l.* that the pearls were the pearls which Messrs. *Brownrigg & Co.* alluded to when they said they expected to receive a parcel of pearls from *India* for sale. Shortly before *July* 1847, Messrs. *Brownrigg & Co.* sent Messrs. *Collet & Co.* the invoice which the Plaintiff had sent with the pearls; it was signed by the Plaintiff, and was headed as follows,—"Invoice of a parcel containing two boxes of pearls shipped per steamer '*Auckland*,' Capt. *Hamilton*, and consigned to Messrs. *Brownrigg & Co.*, of *Liverpool*, for sale and returns on my account and risk." In *July* 1847, Messrs. *Collet & Co.* caused the pearls to be put up for sale by auction, but with the exception of a small part they were bought in: those that were sold produced 320*l.* On the 28th *August* 1847, the bill for 2000*l.* fell due, and it not being convenient to Messrs. *Brownrigg & Co.* to supply the money required to pay it, Messrs. *Collet & Co.* at their request accepted their bill for 1680*l.*, and Messrs. *Brownrigg & Co.* got it discounted, and remitted the amount to Messrs. *Collet & Co.*, in order that therewith and with the 320*l.* they might take up the bill for 2000*l.*: a similar transaction took place between the parties on the bill for 1680*l.* becoming due. On the 27th *November* 1847, Messrs. *Brownrigg & Co.* stopped payment. Messrs. *Collet & Co.*'s last acceptance fell due in *January* 1848, and they paid the holder the amount of it: all the bills drawn by the Plaintiff against the pearls, except one of small amount, were dishonoured. On the 4th *March* 1848, Messrs.

*Forbes*

(Messrs. *Brownrigg & Co.*). On the 8th *March*,  
Messrs. *Forbes & Co.* inquired the date and amount of  
advance, and on the 9th *March* Messrs. *Brownrigg*  
replied that the post which brought Messrs. *Forbes*  
their letter of the 8th *March*, advised the sale of the  
value of the pearls by Messrs. *Collet & Co.*, and that  
the proceeds would not exceed 1500*l.*, which Messrs.  
*& Co.* would naturally hold to reduce the balance  
owed them from Messrs. *Brownrigg & Co.* in account.  
The pearls were sold by private contract on the 8th  
by a person employed by Messrs. *Collet & Co.*,  
producing 1300*l.*; and on the 11th *March* those  
Messrs. wrote in reply to a letter to them of the  
*March* from the Plaintiff's solicitors, that having  
received and paid bills on account of the pearls, the  
debts were credited accordingly.

Under these circumstances the Bill was filed, charging  
the defendants with fraud, and praying for an account  
and payment of the proceeds of the pearls. The cause  
was to be heard before the Vice-Chancellor Lord  
North in *June* 1851, and his Lordship having dis-  
missed the bill as above stated, the Plaintiff appealed to  
the Lord Chancellor. The question between the parties  
depended on the effect to be given to the Factors Act,  
*Vict. c. 39.*

*Bethell* and Mr. *Lewis*, for the Plaintiff.



1852.  
 NAVULSHAW  
 v.  
 BROWNRIGG.

visions of the several Statutes relating to pledges of goods by factors, namely, 4 *Geo.* 4, c. 83, 6 *Geo.* 4, c. 94, and 5 & 6 *Vict.* c. 39, and to the cases of *Evans v. Trueman* (*a*), *Gill v. Kymer* (*b*), *Haynes v. Foster* (*c*). Upon the point of the form of the suit, as a bill in respect of a single transaction, they cited *Mackenzie v. Johnston* (*d*), and *Mit. Pl.* 159, ed. 4.

Mr. *Rolt* and Mr. *Goldsmid*, for the Defendants, supported the decision of the Vice-Chancellor.

The line of argument adopted by them was similar to that which will be found taken by the Lord Chancellor in his judgment. They cited *Stedman v. Martinnant* (*e*), *Ex parte Skinner* (*f*). In reference to the form of the suit, they mentioned *Adams v. Fisher* (*g*), *Lockwood v. Abdy* (*h*), *King v. Rossett* (*i*), *Foley v. Hill* (*k*), *Phillips v. Phillips* (*l*).

Mr. *Lewis* replied.

*The LORD CHANCELLOR.*

This is a case of very great importance to the mercantile world, and depends upon certain Acts of Parliament, which are framed in rather a peculiar manner. The general question is as to the right of the Plaintiff to recover the proceeds of two boxes of pearls which he consigned to this country for sale, and which were pledged by the consignee, and were afterwards sold by the pledgee under circumstances which I shall presently state.

It

- |                                    |                                  |
|------------------------------------|----------------------------------|
| (a) 1 <i>Moody &amp; R.</i> 10.    | (g) 3 <i>Myl. &amp; Cr.</i> 526. |
| (b) 5 <i>Moore</i> , 503.          | (h) 14 <i>Sim.</i> 437.          |
| (c) 2 <i>Crompt. &amp; M.</i> 237. | (i) 2 <i>You. &amp; J.</i> 33.   |
| (d) 4 <i>Madd.</i> 373.            | (k) 1 <i>Phil.</i> 399.          |
| (e) 13 <i>East</i> , 427.          | (l) 9 <i>Hare</i> , 471.         |
| (f) 1 <i>Deac. &amp; Ch.</i> 403.  |                                  |

It is impossible to refer with any advantage to the facts of the case, without first ascertaining what the law is as regards the right of the factor to pledge the goods which are intrusted to him for sale, that is, the right to do so as between him and the person to whom he pledges them. Upon this subject the common law was very strict, for not only the factor could not pledge the goods, however necessary it might be to raise money for the purposes of the principal, but even where he had accepted bills for the principal, he could not pledge the goods so as to give the pledgee the right to retain the produce of those goods if he sold them, even to pay bills drawn upon the original agent and paid by the pledgee to the credit and honour of the principal: so that, in point of fact, there could by the common law be no dealing by way of pledge with goods which had been remitted to an agent, without an express authority to pledge. That was found to be inconvenient, and several Acts of Parliament were passed successively, in order to meet the case; but it is by slow degrees that the present state of the law has been arrived at.

The first Act, the 4th *Geo.* 4, c. 83, went a very short way: it merely gave to the person who took the goods pledged a right co-extensive with that of the person pledging.

Then came the 6th *Geo.* 4, c. 94, which went a great deal further. It in the first place provided by the second section, that any person or persons intrusted with and in possession of bills of lading, &c., should be deemed to be the true owners of the goods mentioned in them, so far as to give validity to any contract or agreement to be made by such person or persons so intrusted and in possession with any person or persons for the sale or disposition

1852.  
  
 NAVULSHAW  
 v.  
 BROWNRIGG.

1852.  
  
 NAVULSHAW  
 v.  
 BROWNBIGG.

disposition of the said goods, or for the deposit or pledge thereof, &c.; provided that such person or persons have not notice by such documents, or either of them, or otherwise that such person or persons so intrusted as aforesaid were not the actual and *bonâ fide* owners of such goods. This enabled the agent, as regarded third persons, to sell or to pledge property, provided the person to whom he sold or with whom he pledged it did not know that he (the person selling or pledging) was not the actual and *bonâ fide* owner of the property. Thus an agent could only be safely dealt with for sale or pledge if he was not known to be such agent. This followed the important clause in the fourth section which is still operative, and is very different from that just noticed: it is, that after the day named it shall be lawful for any person to contract with any agent intrusted with any goods, wares, or merchandise, or to whom the same may be consigned (not saying for what purpose but generally), for the purchase of any such goods, wares and merchandise, and to receive the same of and pay for the same to such agent, and such contract shall be binding upon the owners, "provided such contract and payment be made in the usual and ordinary course of business, and that such person or persons, &c., shall not when such contract is entered into or payment made have notice that such agent or agents is or are not authorized to sell the said goods, wares, and merchandise, or to receive the said purchase-money." This clause takes entirely another view of the case from that presented in the second section, where the validity of the transaction is made to depend upon the person dealing not knowing that he is dealing with an agent, whereas in this fourth section the person dealing does know that he is dealing with an agent, but though he know this, if he does not also know that the agent has not authority

**city** to do the act, he is perfectly safe in buying the  
**goods**. So far, therefore, the law is, that a man may  
**safely** buy of an agent, knowing him to be such, if  
**he** does not know (and this is absolutely necessary)  
**that** the agent is prevented from selling. The Act  
**also** gives to persons accepting goods in pledge from  
**known** agents, the interest of the person who makes the  
**pledge**, and there is a provision making the act of the  
**agent**, where he acts contrary to his authority, a misde-  
**meanor**, on which I shall have an observation to make  
**presently** : so that whilst the Legislature gave to mer-  
**chants** and persons dealing with agents every possible  
**security**, it did not give impunity to the agent who did  
**a wrongful** act in making a pledge or sale which his  
**authority** did not, as between him and his principal,  
**enable** him to carry into execution.

1852.  
 NAVULSHAW  
 v.  
 BROWNRIGG.

There were, however, after the passing of this Act,  
 still further difficulties to be dealt with, for it will  
 be found, on looking at the second section, that it  
 relates only to purchases and pledges where the per-  
 son taking the property does not know that the party  
 from whom he takes is an agent, and the fourth sec-  
 tion only provides for the cases of sale or purchase.  
 The 5 & 6 *Vict.* c. 39, however, carried the law fur-  
 ther. After reciting the former Act of Parliament, it  
 recites, "but under the said Act and the present state  
 of the law, advances cannot safely be made upon goods  
 or documents to persons known to have possession  
 thereof as agents only ;" it thus states that as the law  
 then stood, advances could not safely be made to a man  
 whom you knew to be an agent only, which was true  
 enough : it then recites, and a very important recital it  
 is, "whereas advances on the security of goods and  
 merchandise have become an usual and ordinary course

1852.

NAVULSHAW  
v.  
BROWNRIGG.

of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto and that the same protection and validity should be extended to *bonâ fide* advances upon goods and merchandise as by the said recited Act is given to sales and that owners intrusting agents with the possession of goods and merchandise, or of documents of title thereto should in all cases where such owners by the said recited Act or otherwise would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien for any advances *bonâ fide* made on the security thereof." The Act of Parliament in fact states that money could not then safely advanced upon the pledge of goods with a known agent, and says that advances on the security of goods had become an usual and ordinary course of business and that it is desirable to put such advances upon precisely the same footing as purchases stood under the former Act of Parliament; it recites that much litigation had arisen, and that it was desirable that the law should be put on a clear and certain basis; and it then takes an entirely new mode of carrying this into effect. By the 6 Geo. IV., the way in which it was carried into effect was by saying that a man might purchase from a known agent, provided that it was in the usual course of business, and that he did not know that the agent had not authority; so that only two things were necessary to give validity to a sale by even a known agent, namely, first, that it was in the ordinary course of business, and, secondly, that the person dealing did not know that the agent had not authority to sell. The Act of the 5 & 6 Vict. c. 39, intending then to put pledges upon exactly the same footing as purchases, states that "advances on the security of goods and merchandise have become an usual and ordinary course of business;"

thi

this must mean an usual and ordinary course of business of general agents, that is, of general agents for sale. Then observe the difference in the machinery. The former Act says that a man is safe in buying of a known agent in the ordinary course of business, if he is not aware that the agent has not authority; but this Act recites that the pledge is in the ordinary course of business, and does not therefore make that any longer a condition, but assumes that the pledge will be in the ordinary course of business; and it then provides, that after the passing of the Act any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge lien or security *bonâ fide* made by any person with such agent, as well for any original loan advance or payment made upon the security of such goods or documents, as also for any further or continuing advance, and such contract or agreement shall be binding upon and good against the owner of such goods and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made, is only an agent. The Act no longer says that the transaction must be in the ordinary course of business, because it states that it is so, but for the purpose of giving title to the pledgee it constitutes at once the agent the owner; it says that a person dealing with an agent for pledge of property may safely consider him as the owner although he knows him to be an agent, provided only such person is acting *bonâ fide*, and that he is not bound to ask for the agent's authority. This places the matter on a totally different ground to that on which it stood previously; the agent is

1852.  
  
 NAVULSHAW  
 v.  
 BROWNRIGG.

1852.  
 NAVULSHAW  
 v.  
 BROWNEIGG.

to be deemed the owner of the property, and may be dealt with as such, provided the party dealing with him acts *bonâ fide*. Then comes the proviso in the third section upon which everything turns: it is, that everything the Act contained shall be deemed and construed to give validity to such contracts and agreements only, and protect only such loans, &c. "as shall be made *bonâ fide* and without notice that the agent making such contracts or agreements as aforesaid has not authority to make the same, or is acting *malâ fide* in respect thereof against the owner of such goods and merchandise:" it further provides, that nothing therein contained shall be construed to extend to or protect any lien or pledge for or in respect of any antecedent debt owing from the agent to the person to whom the pledge is given. It was not the course the object of the Legislature to authorize an agent to pledge another man's property or to deviate from any orders or authority received from the owner and therefore, as the Act expresses it, for the purpose and to the intent of protecting *bonâ fide* loans and advances (though made with notice of the agent not being the owner, but without any notice of the agent's acting without authority) and to no further or other intent or purpose, such contract or agreement shall be binding.

Under this Act, therefore, an agent may be treated as the owner of the property in accepting from him a pledge of goods known to have been deposited with or transmitted to him as agent, if the transaction is *bonâ fide* (it is assumed it will be in the ordinary course of business) and there is no notice that the agent is making the contract either *malâ fide* or beyond his authority. There is a further provision as regards the misdemeanor, which still continues, but with a very important alteration, to which I shall presently refer.

So

So far, then, nothing can be plainer than the Act of Parliament; but the question naturally arises, what is the sort of notice which is to bind the person accepting the pledge. This point came before Lord *Tenterden* at *Nisi Prius*, in the case of *Evans v. Trueman* (a), and his Lordship, referring to the Act 6 Geo. IV., which is still binding as regards purchases, as the Act of the present Queen is as regards pledges, lays down the rule generally, and says, "The expression of the Statute is, that a party is to be entitled to its protection if he shall not have notice by the documents or otherwise that the pledger was not the actual and *bonâ fide* owner of the goods pledged: a person may have knowledge of a fact either by direct communication, or by being aware of circumstances which must lead a reasonable man, applying his mind to them and judging from them, to the conclusion that the fact is so: knowledge acquired in either of these ways is enough, I think, to exclude a party from the benefit of the provisions of this Statute; slight suspicion I think will not." This last statement appears to be laid down a little too much at large: I do not mean to say that circumstances may not be equivalent to an actual notice, because they may be stronger than any words; but I should say that no mere suspicion would affect the transaction. The Act was intended to give validity to general dealings in the city of *London*; and it would never do to say, that a person may deal with another who is an agent but who, as regards him, is considered as the owner provided he is acting *bonâ fide* and has not notice that the agent goes beyond his authority, and then to hold that suspicion would fix him with notice. If there is any *mala fides* there is an end of the case; but if the person is acting in good faith it is impossible to say that any mere suspicion can take from

1852.

NAVULSHAW  
v.  
BROWNRIGG.

(a) 1 *Moody & R.* 10.



1852.

NAVULSHAW

v.

BROWNBIGG.

from him the protection with which he is surrounded by the Act. I think therefore, that Lord *Tenterden* did not put the case so strongly as it should have been put in favour of the Plaintiff; but I do not find the least fault with the way in which the case was left to the jury: His Lordship says, "The question I shall leave to the jury in this case, where there is no evidence of direct communication is, whether the circumstances were such that a reasonable man and a man of business applying his understanding to them, would know that the goods were not *Nevitt's*;" not whether he would draw a conclusion, or might believe or fancy or have implied notice, but he put it to the jury whether a reasonable man, in the common course of business, applying his mind to the matter, would know it. It is necessary, therefore, even according to this case, to fix a man with knowledge of the want of authority in order to take from him the benefit of the Statute; and in this way I entirely agree with the view which the learned Judge took of the construction of the Act of Parliament.

In the case before me, the goods were sent by the Plaintiff Mr. *Navulshaw* to Messrs. *Brownrigg* for sale there is no doubt about that; and it is argued, and properly argued, that by the common law the power of sale would not authorize a pledge: that, however, was a very thing, subject only to the proviso before noticed, which was intended to be remedied by the Statute. Mr. *Navulshaw* almost immediately drew upon Messrs. *Brownrigg* as against his consignment for a sum largely exceeding the value of the goods which he had transmitted there is no doubt that this act, though under the common law it would have given the pledgee no right, even if he had paid the bills, to have retained the goods, which

very hard case, rendered a pledge almost necessary, unless it is supposed that Messrs. *Brownrigg* could pay without it. We have, of course, no right to look at the insolvency; it must be considered a matter of accident or misfortune, and though bearing hardly on the Plaintiff, it has nothing to do with the law of the case. In drawing, therefore, for that large amount, Mr. *Navulshaw* gave a colour to the very right to pledge, and no doubt drove the agents to the necessity of pledging with the *London* house, in order, at all events, to be in funds to meet their liabilities for those bills. It may be taken for granted that a consignment of this nature is for sale, and in dealing with an agent it must in every case be assumed that he has a power to sell, and the Act says that it has become an usual course of business to pledge. It was not legal, but it had become the usual course of business, and the meaning is to give legal effect to that usual course of business. When, therefore, a man is dealing for pledge with an agent who has the consignment, the knowledge that he has the power to sell appears to me to amount to nothing, for every agent who has the disposition of goods must be supposed to have such a power: the pearls here were sent over, not to be cast into the *Mersey*, but to be disposed of: the agents had therefore a power to sell, and having that power, the Act means to give them power to pledge in the clearest and strongest terms; and the circumstance that the person dealing with them knows of the power to sell (the way in which he knows is another question, but I will assume that in the present instance Messrs. *Collet & Co.* had a clear knowledge that there was a power of sale by express intimation before they accepted the bill and took the pledge), would not alter the right, because even if not informed of it, he must be considered to know it. I am assuming a case in which the person dealing knows that he is dealing with  
an

1852.

NAVULSHAW  
v.  
BROWNRIGG.

1852.  
 NAVULSHAW  
 v.  
 BROWNRIGG.

an agent, and then, either the agent has the right to pledge the property when *cadet questio*, or he must have the right to sell, (and because the property must be in his hands for some object of merchandise, the person dealing must have knowledge of that right): but something further is wanted than the right positively to sell, there must be a prohibition from the owner to pledge. If, when Mr. *Navulshaw* sent over those goods, he had said, "I send them to you for sale, but I direct you not to pledge them: I will not authorize you to pledge them, but I direct a sale by yourselves;" and that had been communicated to the *London* house, I am perfectly clear that they could not then have advanced money by way of pledge, because they would have known that the *Liverpool* firm was making the contract without authority, that is, that they were prohibited from making it. In any other view of the law, I do not see where the safety of the Act lies: in every case the agent must be assumed to have power to sell, and it is not to be assumed that he has not power to pledge; there is no obligation to inquire, and under the Statute it is necessary that it should be known that he was prohibited from pledging, in order to endanger the taking a pledge. If we are to speak about probabilities in the dealings which occur in a great city, where there are ten thousand of these transactions occurring constantly, what presumption can be more reasonable than that which happened in the case before the Court should happen. Messrs. *Brownrigg* were in the possession of these goods of value; they were known to possess them as agents; they went to Messrs. *Collet & Co.*, saying, "We have received these pearls from *India*, and we desire you to have them valued, with a view to a sale." The actual deposit of the goods was, it will be observed, in clear furtherance of the directions of Mr. *Navulshaw* himself, for it was not supposed that  
 the

1852.

NAVULSHAW  
v.  
BROWNRIGG.

the house at *Liverpool* were going themselves to sell the pearls; I take for granted, therefore, that the deposit was in furtherance, and not at all in disobedience of the instructions they had received, or a breach of their authority. The pearls were valued accordingly at 2050*l.*; Messrs. *Brownrigg* then go to the *London* house, in whose possession the goods had been for nearly a month, and say "We want an advance:" it is manifest that at that time, and the subsequent sales showed it, these articles did not meet with a ready or good sale. Messrs. *Brownrigg* say, "We want you to advance 2000*l.*," (it is a question who offered the 2000*l.*, but that has nothing to do with the case,) "we want you to make an advance on these pearls." That application was as good a security as a man could have that the transaction was *bonâ fide*: it was made in the ordinary course of business, and there was nothing to lead to suspicion, the goods having been left nearly a month with Messrs. *Collet*, and not a shilling having been previously demanded upon them. In point of fact, although the *London* house did not know it, Messrs. *Brownrigg* had accepted before that period bills to the amount of 2466*l.* in favour of Mr. *Navulshaw*, for which of course they would have held and been entitled to hold the pearls as a security. I consider, therefore, the very application for the loan as an assurance on the part of Messrs. *Brownrigg* that they had a right to pledge, and I think that in that view Messrs. *Collet & Co.* had a right to deal with them as if they were the owners of the property, dealing with them as holders (for the whole turns upon that) with perfect *bona fides*. Independently of that, the only admission as to knowledge is that read from the answer of *Jacob Collet*, in these words: "They believe that shortly before the pearls arrived in *England*, Mr. *Brownrigg* verbally informed Defendants' firm

1852.  
  
 NAVULSHAW  
 v.  
 BROWNRIGG.

firm that they expected to receive from *India* parcel of pearls for sale ;” but it would be a very strong thing to say that that general statement, before the pearl arrived, should be taken as bringing to this party knowledge that this was the identical parcel of pearls which was sent to him for sale ; the answer does not say for sale and for no other purpose. It may be observed also how very likely it was, even if this were strictly the view of it, that Mr. *Navulshaw* when drawing those bills for 2466*l.*, which must have been a large proportion, even in his view, of the value of the pearl would at the same time write and say that he did not object to their being pledged for that sum in case the *Liverpool* house found it inconvenient to make the advance, and directing them not to hurry the sale because he expected a good return on it : he did not say, “ Sell those goods and get rid of them as quickly as you can, whatever the state of the market may be,” but he desired to have a ready although a beneficial sale. It would be the most unsafe thing in the world to deal with matters of this sort upon the presumption that the man taking the pledge did know all that had occurred or did not know that nothing had occurred subsequently to the information thus communicated to him that a given parcel of pearls, taking this to be that parcel, had been transmitted to the house, or was to be transmitted to the house for sale. I think therefore, even in that view, taking Messrs. *Collet & Co* to have had full knowledge that the pearls were transmitted for sale (not thinking that that would prevent them dealing with the agent as for a pledge) and Messrs. *Brownrigg*, taking upon themselves the disposition of the property in a *bonâ fide* transaction, which I must treat under the Act to be a transaction in the ordinary course of business without any

any necessity of further inquiry, that this cannot be considered a case in which there was any notice to Messrs. Collet & Co.

1852.  
  
 NAVULSHAW  
 v.  
 BROWNRIGG.

I have already pointed out that in the Act of the 6 Geo. IV., c. 94, it is required that the purchase shall be in the ordinary course of business, and that in the Act of the present Queen no such thing is required, for the reasons I have stated: that Statute takes a new shape, making the agent the owner for the purpose of conferring a title by way of pledge, though he is known to be agent, provided the person dealing is acting *bonâ fide*, and does not know that the agent has not power to make the pledge. I am therefore clearly of opinion, that I could not give effect to the claim of the Appellant without striking at the clear intent of this Act of Parliament.

In regard to what has been argued in reference to the advances and bills drawn, the two Acts before referred to have taken a singular form when providing for its being a misdemeanor in an agent to exceed his authority by pledging the goods of his principal. In the first Act, the 6 Geo. IV. c. 94, where it is called a misdemeanor to do so, but the case of the agent depositing to secure a debt due to himself by the principal is excepted, it is provided expressly by the eighth section, "that the acceptance of bills of exchange by such person or persons, drawn by or on account of such principal or principals, shall not be considered as constituting any part of such debt so due and owing from such principal or principals, within the true intent and meaning of this Act, so as to excuse the consequence of such a deposit or pledge, unless such bills shall be paid when the same respectively shall become due:" thus a man was not to escape from the penalty

1852.  
  
 NAVULSHAW  
 v.  
 BROWNRIGG.

penalty of the misdemeanor because he had accepted bills in favour of the owner, unless he had also paid the bills. The later Act of Parliament, however, the 5 & 6 V. c. 39, took a very different form, for it provides by the sixth section that the agent shall not be liable to any prosecution for depositing goods, &c., "in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery was justly due and owing to such agent from his principal, together with the amount of any bills of exchange drawn by or on account of such principal, and accepted by such agent:" so that the agent is allowed to bring into the account, in order to save him from punishment, any bills of exchange drawn by or on account of such principal and accepted by the agent, not clogging with the condition that the bills are actually paid by the agent. Thus, then, the mere drawing of the bills by Messrs. *Brownrigg*, amounting as they did in point of fact to more than the value of the goods, would save them from being indicted for misdemeanor; and that, I think, puts an end to the case as regards the renewal of the bill. The notice which Messrs. *Collet* received from the heading of the invoice sent to them, being no more than an express notice that Messrs. *Brownrigg* had received the goods for sale, goes, in my opinion, and for the reasons before stated, for nothing.

It is not necessary in my view of the matter to consider the question, but I am very clear that the second bill was merely in substance (and I must look at this in substance) a continuance of the original transaction: it was one loan or advance of 2000*l.*, of which 320*l.* was paid off by means of the sale which took place  
 of

of some of the pearls; the fact that a new bill was drawn and discounted, and the 320*l.* paid off is matter of form not of substance, and did not alter the original advance. Nothing could be more fair or right than the transaction; the pearls sold went in part liquidation of the sum advanced, and the security was not for any new sum, but for the balance of the old sum. I am therefore of opinion, if it were necessary to go into it, that that was a transaction covered by the original dealing.

1852.  
NAVULSHAW  
v.  
BROWNEIGG.

I may here add, that I see no necessity for this suit; it is a single transaction, and the Plaintiff might, if he had been entitled, have recovered in an action, without coming here. The foundation of the bill is the allegation of fraud and contrivance, and malice, and so on, but all that having entirely failed, I am of opinion that the appeal must be dismissed with costs.

---

THE DEAN OF ELY v. BLISS.

July 31.

THE bill in this suit was filed by the Dean and Chapter of *Ely*, on the 4th *January* 1840, to establish their right to the single value of the tithes of corn and grain, and lambs and wool, against the occupiers

Before *The Lord Chancellor* LORD ST. LEONARDS.  
The Act 2 & 3 Will. IV. c. 100, is unaffected by

the provisions of the Act 3 & 4 Will. IV. c. 27; the interpretation clause of the latter Act, although enacting that the word "land" shall in its meaning extend to tithes, has reference to an estate in tithes, and not to tithes as a chattel, and the 2nd section, therefore, does not embrace the case of a render of tithes as a chattel by the person bound to pay to the tithe owner.



1852.  
  
 DEAN OF ELY  
 v.  
 BLISS.

of a large tract of land, known as the *Lakenheath* fen in the county of *Cambridge*.

The bill stated the title of the Plaintiffs, under letters patent dated the 10th *September*, 33 *Hen. VIII.*, to the rectorial tithes within the parish of *Lakenheath*; that there was within the parish of *Lakenheath*, and the titheable places thereof, a large tract of land which was formerly uninclosed; that the same had been partially drained, by the powers of an Act passed in 15 *Car. II.*, when the same was inclosed, divided, and allotted in severalty; that under the provisions of another Act, passed in 8 *Geo. III.*, the drainage was improved, so that the fen, which had been previously unproductive, or had produced titheable matters or things of very inconsiderable value, became fit to cultivate; and that about fifty years ago, the fen was used and cultivated as arable, meadow, and pasture land, and had produced titheable matters and things of considerable value, the tithes of which were rectorial, and which ought, since the 21st *December* 1837, to have been rendered or paid to the Plaintiffs. The bill then stated, that the Defendants were occupiers, and held parts of the fen, and that they had in every year, since the 21st *December* 1837, taken on and from the said lands various titheable matters, which they had converted to their own use, without rendering to the Plaintiffs the tithes thereof, or making any satisfaction for the same. The bill charged, that if it should be proved that the lands had not theretofore paid some of the tithes demanded, the same was owing to the circumstance that the lands were in former times frequently under water, and were not, till about fifty years before the filing of the bill, brought into regular cultivation, and did not produce any corn or grain, or not in any considerable quantities; but that, nevertheless,  
the

the tithes of lamb and wool were paid to the Dean and Chapter, as rector, or to their lessees, and that the tithes of agistment were also paid to the vicar of the parish.

1852.  
 DEAN OF ELY  
 v.  
 BLISS.

The bill charged, by way of further evidence, that the fen was not exempt, or discharged from the payment of tithes, that in 1808, certain parties claiming under a demise then subsisting, but which had since expired, from the Dean and Chapter, filed their bill for the tithes of corn and grain, lambs and wool, against the then occupiers of the fen, who by their answer among other things alleged, that the lands in question were exonerated from tithes, by reason of their having been parcels of the possessions of the Monasteries of *St. Peter* and *St. Ethelred*, but that they were decreed to account for the tithes then claimed. The bill then stated a pretence on the part of the Defendants, that no tithes whatever, of the nature claimed by the bill, had at any time within sixty years or upwards been rendered, or any satisfaction given in respect of the same to the Plaintiffs or any persons claiming under them; and that by reason thereof, and by virtue of the Act 3 & 4 *Will. IV. c. 27*, the right of the Plaintiffs had become extinct; whereas the Plaintiffs charged, that by an indenture made between the Dean and Chapter of the one part, and *Hugh R. Evans* of the other part, the rectory of *Lakenheath* and the tithes thereto belonging, and claimed by the bill, were demised to *H. R. Evans* for a term of years subsisting, and which had not expired at the time of the passing of the last-mentioned Act, and that the same was subsisting till the 21st *December 1837*.

To this bill one of the Defendants pleaded the Statute of Limitations (3 & 4 *Will. IV. c. 27*) as a bar to the Plaintiffs'

1852.

DEAN OF ELY  
v.  
BLISS.

Plaintiffs' title. The plea set forth the following sections of the statute :—Sect. 1, whereby it was enacted, “ that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows (that is to say), the word ‘land’ shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes, (other than tithes belonging to a spiritual or eleemosynary corporation sole,) and also to any share, estate, or interest in them, or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word ‘rent’ shall extend to all heriot and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land, (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole).” \* \* . \* Sect. 2 whereby it was enacted, “that after the 31st day of *December* 1833, no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.’ Sect. 24, whereby it was enacted, “that after the said 31st day of *December* 1833, no person claiming any land or rent in equity, shall bring any suit to recover the same but within the period during which, by virtue of the provision

provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right, in or to the same as he shall claim therein in equity." Sect. 34, whereby it was enacted, "that at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit*, or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively, might have been made or brought within such period, shall be extinguished." The plea then proceeded:—"And this Defendant for further plea saith, that if the said complainants ever had any right to make an entry or distress, or bring an action or suit to recover the tithes of the tract of land called *Lakenheath Fen* in the said bill mentioned, which this Defendant in nowise admits, such right to make such entry or distress, or to bring such action or suit, did not first accrue to the said complainants, or to any person through whom they claim, within twenty years next before the institution of this suit; and that neither the said complainants, nor any person or persons through whom they claim, have or hath, in respect to the estate or interest claimed by the said complainants, been in possession or in receipt of the profits of the said tithes or any of them, within twenty years next before the institution of this suit; and that an acknowledgment of the title (if any) of the said complainants to the said tithes or any of them hath not been given to said complainants or their agents, in writing signed by this Defendant, nor to his knowledge or belief by any other person or persons in possession or in receipt of the profits of the said tithes, within twenty years next before the institution of this suit."

1852.  
DEAN OF ELY  
v.  
BLISS.

1852.  
 DEAN OF ELY  
 v.  
 BLISS.

This plea was argued on the 10th *May* 1842, before Lord *Langdale*, the late Master of the Rolls, who allowed it. A report of the case will be found in the fifth Volume of Mr. *Beavan's* Reports, p. 574.

Against that decision the Plaintiffs the Dean and Chapter appealed to the Lord Chancellor (Lord *Lyndhurst*), who was of opinion that, whatever might be the construction of the Act 3 & 4 *Will.* 4, c. 27, in reference to tithes, it did not include mixed tithes, but only predial tithes; but the question at issue being more a question of law than of equity, he directed a case to be sent to the Court of Exchequer, for the opinion of that Court upon the Plaintiffs' title: the case, after considerable discussion, was drawn so as to extend to the whole of the tithes claimed by the bill. The Barons of the Exchequer, before whom the question was argued in *May* and *June* 1846, returned their certificate, to the effect that the Plaintiffs were entitled to recover from the Defendant treble the value of the predial tithes claimed by the suit (a).

Upon this certificate the cause came back before the Lord Chancellor (Lord *Cottenham*), upon the equity reserved. His Lordship, not being satisfied with the conclusion arrived at by the Court of Exchequer, on the 12th *June* 1846 sent the same case to the Court of Common Pleas, where it was argued in Hilary Term 1849 before the then Lord Chief Justice (Sir *Thomas Wilde*), and three other Judges of that Court, viz., Justices *Maule*, *Cresswell*, and *Williams*, but no decision was given by them until the 7th *May* 1851, when, without assigning any reasons, they made their certificate, of which the following is a copy:—

“ This

(a) *Sub nomine Dean of Ely v. Cash*, 15 *M. & W.* 617.

“ This case has been argued before us by counsel, and we are of opinion, that, in the action mentioned in the case proposed to us, the Plaintiffs are entitled to recover from the Defendant treble the value of the predial tithes claimed by the Dean and Chapter of *Ely* in the said suit.

1852.  
 DEAN OF EL  
 v.  
 BLISS.

“ C. CRESSWELL.

“ EDWARD VAUGHAN WILLIAMS.”

**Mr.** Justice *Maule* was of opinion, that the Plaintiffs were not entitled to recover. The Lord Chief Justice did not sign the certificate, in consequence of his having in the meantime been appointed to the office of Lord Chancellor.

The cause now came on to be heard before the Lord Chancellor, (Lord *St. Leonards*,) on the equity reserved.

**Mr.** *Bethell*, Mr. *Lloyd*, and Mr. *Fleming*, for the Plaintiffs.

The sole question is, did the Legislature, by the Act 3 & 4 *Will.* 4, c. 27, intend by implication to repeal the Act 2 & 3 *Will.* 4, c. 100. This could not have been the intention, as is shown by the fact that another Act, 4 & 5 *Will.* 4, c. 83, was passed the next year, suspending the operation of the Act 2 & 3 *Will.* 4, c. 100, but in no other way affecting its provisions. It is submitted, however, that the period of twenty years, prescribed by the Act 3 & 4 *Will.* 4, c. 27, has no reference to tithes as a chattel. Before the Reformation, no suit could have been brought in the temporal courts for tithes, which were an ecclesiastical inheritance issuing out of land; but by the Act 32 *Hen.* 8, c. 7, s. 7, tithes and other ecclesiastical matters were first made the subject of conveyance and recovery in the temporal courts, though between spiritual persons there still remained an

1852.

DEAN OF ELY  
v.  
BLISS.

appeal to the spiritual courts. The remedy for the subtraction of tithes as a chattel continued in the ecclesiastical court until, by the Act 2 & 3 *Edw.* 6, c. 13, a person was enabled to bring an action at law for the subtraction of predial tithes to the extent of three times their value, and Courts of equity, in aid of the common law, sanctioned the institution of suits for the recovery of tithes simply. By the 5th section of the Act 53 *Geo.* 3 c. 127, the time within which any action or suit could be instituted for the recovery of tithes was limited to "six years from the time when such tithes became due," but that limitation was clearly as between owner and occupier only, and up to the time of the passing of the Act 2 & 3 *Will.* 4, c. 100, the mere nonpayment of tithes for any period, however long, was no ground of exemption, but by that Act, which was to come into operation one year after it passed, periods of limitation were for the first time prescribed, with reference to exemptions from tithes. The difficulty arises from the interpretation clause of the Act 3 & 4 *Will.* 4, c. 27, which enacts that the word "land" shall extend to tithes, and also upon the 2nd section of that statute, by which it is enacted, that no action shall be brought for the recovery of any land or rent, but within twenty years after the right of action shall have first accrued. Looking, however, to the whole scope of the Act, and to the language of its particular provisions, it is clear that the Legislature did not affect to deal with tithes as a chattel. Thus, an action brought to recover the tithes as a hereditament is consistent with the declaration in the 2nd section, "but within twenty years after the right to make such entry or distress, or to bring such action, shall have first accrued," but is inapplicable to the word tithes as a chattel, which cannot be said to exist until the land itself or the inheritance be recovered. The clause of the 3rd section, which must be read along with the 2nd, "wh

t

the **person** claiming such land or rent shall, in respect of the **estate** or interest claimed," also shows that the Legislature was not referring to tithes as a chattel. So again, the language of the 24th section imports that the subject-matter of the Act is some estate recoverable in equity, which, if legal, would have been recoverable at law, which clearly could not be predicated of a tithe **land**, &c.: these sections explain any ambiguity which otherwise might have existed, if the interpretation clause **was** alone to be regarded. In short, the Act does not **apply** as between tithe owner and occupier, but must **be** understood as applying to persons claiming adverse **interests** in the inheritance: and the right of the tithe **owner** cannot be extinguished so long as it remains in **a tenant**.

1852.

DEAN OF ELY  
v.  
BLISS.

*Mr. Rolt and Mr. Eagle, contra.*

It is said that the statute 3 & 4 Will. 4, c. 27, can **only** be pleaded by a tithe owner against a tithe owner, **and** not by a tithe occupier against an alleged owner; **but** the interpretation clause of that statute in terms **includes** tithes whether as an inheritance or as a chattel, and there is no reason why the incident should be **separated** from the inheritance. If the occupier happened to be himself the owner, it will not be denied that the statute might be used as a shield. The Defendant here is not concerned to show that the right is in him; if he had shown that the right of the Plaintiffs was taken away by conveyance, it would have been sufficient, without showing in whom the estate was vested, and *à fortiori*, where the right is extinguished, as it is by the operation of the 34th section of this statute, the benefit of which may be taken advantage of by every person. If the right of the Plaintiffs is extinguished for one purpose, it is a peremptory and inflexible rule of law that it is extinguished for every purpose. Thus in the  
case



1852.  
 DEAN OF ELY  
 v.  
 BLISS.

case of *Cholmondeley v. Clinton* (a), Sir T. Plumer says: "However clear and indisputable the title, if the merit could be inquired into, however demonstratively tortious and wrongful the adverse possession, the fact of such possession and the time preclude all investigation of the title. The door of justice is closed. The claimant cannot be heard to show his title. It is a decisive answer to him that he comes too late. That alone is the bar: his title remains, but he has lost his remedy." In short, mere nonperception for twenty years is a positive bar; *Nepean v. Knight* (b), *Culley v. Taylerson* (c), *Jarvis v. Salter* (d), *Governor of Lucton School v. Smith* (e). The Defendant does not contend that the Act 3 & 4 Will. 4 repeals the former Act 2 & 3 Will. 4 altogether; but if there is any inconsistency between the two Acts, it is clear that the former would be repealed.

Mr. Bethell, in reply.

The only object of the Legislature in passing the Act 3 & 4 Will. 4, c. 27, was, that tithes as an inheritance should not be treated on a different footing from any other inheritance.

The LORD CHANCELLOR.

All the difficulties in the present case have arisen from the way in which the legislation, as regarded tithes and real property, was carried on. Lord Tenterden had his own plans, which were carried into effect by several Acts of Parliament, and in the meantime bills with similar objects emanating from the Real Property Commissioners, were proceeded with, but in each case without that communication between the parties which ought to have taken place. Two things were intended to be provided

(a) 2 J. & W. 1; see p. 139.

(b) 2 M. & W. 894.

(c) 11 A. & E. 1008.

(d) 3 Bingh. N.C. 544.

(e) 3 E. & Y., 1117; S. C.,  
 M'Le. 17.

ed for, in reference to tithes. One was the estate  
 es; tithes in lay hands being just as much a subject  
 iveryance, enjoyment, transfer, and disposition, as  
 nd itself or any other property, and were capable  
 ng, not perhaps strictly divested, but of being  
 d from the right owner into other channels, and  
 pect to which the right owner himself had a  
 y under the law as it stood before the Acts of Par-  
 t, now under consideration, passed. On the other  
 there was the common render of tithes, which was  
 nct subject, being simply the render of a chattel,  
 ving nothing whatever to do (except that it sprang  
 the right to the inheritance, or the freehold) with  
 eritance itself or the person to whom it belonged.  
 cts of Parliament before me intended no doubt to  
 e in different ways for both those rights. The  
 ct, 2 & 3 *Will.* 4, c. 100, only intended to apply to  
 se of tithes as a chattel, and to moduses, composi-  
 eal, and the like, and not to an estate in tithes, as  
 n adverse claimants. There had been a very great  
 t, which was put an end to by the case of *Salkeld*  
*ston* (a), whether or not a mere nonpayment could  
 up under that Act of Parliament in discharge of  
 without showing a foundation to which that non-  
 nt was to be referred; in other words, without  
 ing a composition real, or a conveyance which  
 account for the nonpayment of the tithes; it has,  
 er, by a very liberal construction, but by consi-  
 e authority, been decided that a mere nonpayment  
 in that Act of Parliament. It is singular enough  
 at Act, providing as it did for rights to tithes, and  
 ning the time for making out a claim in discharge  
 es (in which respect it is decidedly a Statute of  
 ations as regards tithes, though it operates, as has  
 ointed out, in a very different way from the other  
 statute,

1852.

DEAN OF ELY  
 v.  
 BLISS.

(a) 1 *Mac. & G.* 242.

1852.  
 DEAN OF ELY  
 v.  
 BLISS.

statute, (3 & 4 *Will.* 4, c. 27,) does not anywhere provide strictly for the mere recovery of tithes as tithes in the ordinary sense of a render of tithes, and it was not necessary to do so, for the Acts of Parliament which were then in existence had already provided sufficient remedies for the tithe owner as against the tithe payer, and the time of six years had been limited within which arrears could be recovered. That Act passed, though it was not to come into operation until the expiration of one year from the end of the session in which it passed, but before that time had arrived, the Act 3 & 4 *Will.* 4, c. 27, received the royal assent; and the question is, whether the latter Act has or not repealed a portion of the Act of the preceding session, by lessening the time prescribed by that Act, and creating a less bar in the case of a claim to tithes as a chattel; or whether the latter Act refers only to a dispute between two persons claiming adversely the estate in the tithes, to be rendered by a third person. Without reference to the language of the Acts, it would certainly require a very strong and clear case to enable the Court to say that a statute, passed so recently after a former one (upon the occasion of which it is impossible to suppose that there was not some knowledge of the former statute, creating as it did at the time a great sensation with respect to the rights of the church), and which does not profess to repeal a leading enactment in that former statute, should by implication have that effect. Under such circumstances, it would be natural to expect to find upon the face of the later Act, a reference to what had been done the year before,—an intention to diminish the time limited by the previous Act, and to make a new enactment upon the subject. Still, however, if by the later Act the Legislature has really done what is represented, I must give effect to it, though the operation would be to abrogate a portion of the former Act of Parliament. I may here observe, without giving too much weight to

1852.

DEAN OF ELY

v.

BLISS.

to ~~it~~, that I cannot, in the consideration of this question, shut out the Act 5 & 6 *Will.* 4, c. 85, referring as it does to the Act 2 & 3 *Will.* 4, c. 100, and acting upon the provisions of that statute as if it were altogether intact, and nowhere affording the slightest grounds for supposing that the intermediate Act had altered any of the leading provisions of the first Act. Dismissing the Act 5 & 6 *Will.* 4, c. 85, with that observation, I then have to consider what is the real operation of the Act 3 & 4 *Will.* 4, c. 27. There has been a great deal of discussion, which I am not surprised at, in regard to the meaning of the words; but it is to be observed, that although the meaning of the words is defined by the statute, yet that statute declares (what would have been supplied if it had not been so expressed), that the words are not to have that meaning attached to them in the interpretation clause, if a contrary intention appears. It has been very much doubted, and I concur in that doubt, whether these interpretation clauses, which are of modern origin, have not introduced more mischief than they have avoided, for they have attempted to put a general construction on words which do not admit of such a construction in the different senses in which they are introduced in the various clauses of an Act of Parliament. Thus much, however, is perfectly clear, that the word "land" is made to extend to tithes, with the exception of those belonging to spiritual or eleemosynary corporations sole (which are not intended to be touched), and "any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure;" and then the word "rent" is made to extend to various periodical payments, except moduses or compositions belonging to a spiritual or eleemosynary corporation sole; it was said that that showed an intention to extend the Act to a chattel, that is, to a mere render of

1852.  
 DEAN OF ELY  
 v.  
 BLISS.

of tithes. I cannot follow that argument, because, although "land" is made to include tithes, and "rent" is made to include periodical payments, yet in each case the exception is introduced so as to exclude tithes, or what represented tithes, moduses or compositions belonging to a spiritual or eleemosynary corporation sole; and that, therefore, leaves it to be ascertained after all, in what sense the word is used when we come to the particular provision (section 2) which is to govern this case. Bearing in mind that an estate in tithes was, for all purposes of this section, precisely the same as an estate in land,—it might be lost, it might be recovered, it might be the subject of disposition in every way, just as land,—the section enacts, that after the 31st *December* 1833, "no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued, to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same." It was not attempted to be denied that these words properly applied to the estate in land, or in a rent, and to the estate in tithes; but it was supposed, that even if that be admitted yet that the Defendant could maintain his plea. No doubt considerable difficulty in the construction of this Act of Parliament has arisen in the way in which it has used the word "rent," and afterwards in the way in which it speaks of "profits;" but I think it clear, from repeated consideration of it, that "rent," in the sense in which it is spoken of in the 2nd section, means rent of inheritance, and that it does not mean rent reserved by a lease, for example, or rent in the common

mon and ordinary form of a render of rent for property. That construction of the word "rent" will by analogy assist in the interpretation to be put on the word "land:" the word "land" speaks for itself; it means the inheritance of land, the freehold of land, and the Act does not deal with land in any other sense than in that where a person has the right to the land itself. Then, by the interpretation clause, the word "land" is made to include tithes. It would seem to follow, unless there is some reason against it, that if land represents tithes, tithes, being to be represented by land, must be subject to the same rule of construction, and open to the same interpretation as land itself. There are two subjects, land, rent. Rent means the subject of inheritance; land has the same signification: must not therefore tithes, which are represented by, and treated as included in land, mean, *primâ facie*, the very same thing? There is clearly the same subject for the Act to operate upon. There was also clearly the same intention as regards the barring of adverse claims. But has the Legislature in that Act given to tithes any other and more extensive operation? It would then have interfered with the former Act of Parliament. If the word "tithes," as represented by land, is to be confined to that which is its natural interpretation, and if it receives as extensive an operation as the words in which it is in company, no violence will be done to the former Act of Parliament, which has not been repealed, and which will be left to operate in the very case now before me, independently of the other statutory provisions, as regards the arrears of rent or interest to be recovered. These Acts of Parliament are in *pari materiâ*, and ought to be read as consistent with each other, and with the view of providing for the different cases they respectively intended to remedy; but, according to the Defendant's construction, one statute is to be set up against the other, and

an

1852.  
 DEAN OF ELY  
 v.  
 BLISS.

1852.  
 DEAN OF ELY  
 v.  
 BLISS.

an enlarged construction is to be given to the later statute, for the mere purpose of partially repealing the former one, not on account of its being a *casus omissus*, which required to be provided for, but in order to provide for a case which, in my opinion, is already sufficiently provided for.

I will postpone the consideration as to how far the two Acts are consistent with each other until I shall have ascertained whether there is anything in the further provisions of the later Act in order to justify such a construction as that which has been contended for by the Defendant. The 24th section of the Act 3 & Will. 4, c. 27, is, as it appears to me, in terms very much against the plea; it enacts that after a certain day "no person claiming any land or rent in equity," &c. I have already observed, that "rent" does not mean rent in the common and ordinary acceptation of rent payable by a tenant to a landlord, and by the interpretation clause "land" includes tithes, and therefore the section may be read thus:—"No person claiming any land, (or tithes,) or rent in equity, shall bring any suit to recover the same, but within the period during which by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity." There is hardly a word in this section, but what militates against the claim set up by the Defendant in this case. It is clearly confined to the estate. When the words "entry and distress" are used, they are referred properly to rent and the action or suit is referred properly to the estate in land; and thus, when any person brings a suit to recover tithes "under the provisions hereinbefore contained (and we have already seen that those provisions, according

ing to section 2, would only enable the person to recover them in respect of an estate in the tithes, and would not enable him to recover them *qua* tithes from the person who was bound to render them,) it is perfectly clear that no person can in equity go beyond the time which is before limited for the recovery of the estate in the tithes. The construction I have now adopted gives to every word in this section its proper operation, and tells very much in favour of the Plaintiffs' contention.

1852.  
  
 DEAN OF ELY  
 v.  
 BLISS.

There are other clauses of this Act which are calculated somewhat to embarrass the decision of this case. I particularly allude to the 43rd clause. That clause enacts, that after a given period "no person claiming any tithes, legacy, or other property for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same, but within the period during which he might bring such action or suit at law or in equity." It is very difficult to say how that was intended to operate. It was insisted, that it proves clearly that in that section the Legislature was dealing with tithes as a chattel, even though it may be admitted that in the previous sections it was dealing with tithes as an inheritance. But there is this difference between the 24th and 43rd sections, namely, when in the 24th section the Legislature is speaking of a remedy in equity being only co-extensive with the right at law, it is speaking of the right to recover "by virtue of the provisions hereinbefore contained;" when, however, it is speaking in the 43rd clause, in which it is intended to bind the proceedings in spiritual courts, no reference is made to "the provisions hereinbefore contained," but it appears to be a general provision, that "no person claiming any tithes, legacy, or other property, for the recovery of which he might bring an action or suit at law



1852.  
 DEAN OF ELY  
 v.  
 BLISS.

law or in equity," (whether under that Act of Parliament, or any other Act of Parliament,) "shall bring a suit or other proceeding in any spiritual court to recover the same, but within the period during which he might bring such action or suit at law or in equity." When, therefore, I find one clause in the Act of Parliament confining the proceedings in a Court of equity, in analogy to the remedies at law, and confining that to the provisions thereinbefore contained, and I find another limiting proceedings in another Court by the remedies at law or in equity, but not referring to any previous provisions contained in the particular Act, I am bound to consider that the Legislature was in the latter instance dealing generally with all rights of action or suit, and merely meant to prevent proceedings in the spiritual courts to recover tithes, or moduses, by persons who could not within the same time have recovered at law or in equity, leaving it entirely open under what provisions or what Acts of Parliament that remedy might be enforced.

My opinion therefore is, on every part of this Act of Parliament (3 & 4 Will. 4, c. 27), which I have often had occasion to consider, that the 2nd section, governed and regulated by the other sections, does not embrace the case which it was insisted it did embrace, namely, the case of a render of tithes by the person bound to render them, to the person who is entitled to receive them.

It was argued, with great ingenuity, that if that be so, still that the Defendant's contention was perfectly right, for that if the word "tithes" was to be confined to the estate, yet that in this case the Defendant had a title by adverse possession. I confess I do not see how that doctrine bears on the case. It is perfectly settled, that adverse possession is no longer necessary, in the sense in which

1852.

DEAN OF ELY  
v.  
BLISS.

which it was formerly used, but that mere possession may be, and is sufficient under many circumstances, to give a title adversely; and although perhaps now, no better expression than adverse possession can be used, yet it is not adverse in the sense in which that phrase was used before these Acts of Parliament were passed. But taking that to be immaterial, which I think it is not, it was said, and said truly, that by the 34th section of the Act 3 & 4 Will. 4, c. 27, where the remedy is gone, the right and title of the person to the land, &c., shall be extinguished, and that in this respect it differed from the former Statutes of Limitation, which were held not to bar the right, but merely the remedy. It was argued by the Plaintiffs, that the mere duty of rendering tithes could not be extinguished; that question need not embarrass the Court, because the Act of Parliament says the right shall be extinguished; and it would not be necessary, therefore, to show (if the case was within this Act) that the right was transferred to somebody else, because extinguishment would be sufficient. The Defendant however contended, that if any claim between two persons, who are proceeding adversely one against the other for the estate in the tithes is extinguished, the extinguishment must take place to all intents and purposes, and for the benefit of the whole world, and that therefore the person liable to render the tithes, the landholder subject to tithes, ought to have the benefit of that extinguishment, and to be wholly discharged from the payment of tithes. The fallacy of that argument lies in this, that the case, supposed from the very nature of it, is one in which the landholder is rendering the tithes without dispute; there is no dispute as to his liability to pay tithes, but the dispute is between a person who has been receiving the tithes for a certain number of years, without, as another person alleges, having a title to those tithes; and the rival claimant having brought his action, the

1852.  
 DEAN OF ELY  
 v.  
 BLISS.

the Statute being set up, is defeated; as regards the right is extinguished, if he ever had any right; but what is the consequence? There is no dispute or doubt raised as to the liability of the person who is to render the tithes, and who is not before the Court; and the *prima facie* result of such an action would be, that a person who had succeeded in defeating the claimant, would remain in possession of the tithes, which had been up to that time rendered to him. The question of the liability to render tithes could only arise on a claim against a tithepayer, and never can be affected by a contest, or litigation between persons claiming the estate in the tithes. Whether the case might arise, in which one claimant being barred by the Statute set up by the other, the latter could not afterwards maintain an action against a person claiming exemption from the tithes, I do not say. I have nothing to do with such a case. I am looking at this Act of Parliament, to see whether in this particular case I can apply the doctrine of extinguishment so as to give a title to the Defendant. What possible ground is there for the assertion of such a title in the Defendant here? The Plaintiff is claiming the render of tithes, and there is no contest about the title to the estate in the tithes; in this sense there are not two claimants to the tithes; if the Plaintiffs' title be good, nobody else can claim the tithes on this record. No plea has been set up here that another person has been receiving the tithes as claimed. It is a simple question, whether this spiritual corporation is or is not entitled to the tithes in kind. It is a question of render of tithes, not involving a question of title as between two adverse claimants to the estate in the tithes, and therefore the 34th section has I think no bearing on the merits of the case in point of law.

The result, in my opinion, is, that the Act 3 & 4 W

4, c. 27, does not take away the right of the Plaintiffs as against the Defendant. Looking at the leading provisions of both these Acts of Parliament, I am of opinion that the Courts of law, to which this case has been referred, have very properly considered that the two Acts stand consistently with each other. Standing as they do together, yet each having its own operation, they appear to form a very useful and convenient body of law; and I am not at all disposed, nor am I entitled, to break in upon a system so established in the way I should do if I were to sustain the defence set up.

1852.  
DEAN OF ELY  
v.  
BLISS.

The consequence therefore is, that the plea must be overruled, and the case must then proceed in the ordinary course.

1852.

Nov. 15, 16,  
24.

## VISCOUNT BARRINGTON v. LIDDELL.

Before *The*  
*Lord Chan-*  
*cellor* LORD  
ST. LEON-  
ARDS.

THIS was an appeal by the Right Honourable *William Keppel Viscount Barrington*, one of the  
Plaintiffs

By the marriage settlement of *A. B.*, the grand nephew of the testator, certain family estates were settled so as to give to the father of *A. B.* an estate for life and then an estate for life to *A. B.* himself, both these estates being subject to a term of years the trusts of which were to raise portions for young children of the marriage to an amount in the whole varying according to the number of such children, and which in the events which happened was 40,000*l.* The testator by his will made a large provision for *A. B.*, and then reciting the settlement bequeathed to his executors a sum of 15,000*l.* on trust to invest and accumulate the income during the life of *A. B.*, but if *A. B.* should die within twenty years from his the testator's death then the accumulation to continue for so long a time as would make up the twenty years, and upon the completion of the accumulation, on trust to stand possessed of the trust money to pay and apply the same or a competent part thereof in satisfaction of the portions and in exoneration of the settled estates, and subject thereto upon the trusts of the testator's residuary personal estate: the testator also provided that if before the expiration of the period of accumulation the accumulated fund should be sufficient to answer the aforesaid purposes, then the accumulation should cease. *A. B.* lived beyond twenty-one years from the testator's death; and at the expiration of twenty-one years, a sum of 35,622*l.* was accumulated. A question being raised in reference to the application of this fund, proceedings were subsequently instituted for obtaining the opinion of the Court on the point, at which time the accumulations amounted to 43,643*l.*: Held, that the case fell within the terms of the second exception contained in the second section of the *Thellusson Act*, and that the fund directed to be raised was applicable according to the trusts of the testator's will.

By the terms of the first exception in the second section of the Act, a grantor settlor or devisor or other person or persons may make provision generally for the payment, not only of his own debts but also of the debts of any other persons, and the provision for raising portions for any child &c. mentioned in the second exception includes portions already created, and enables a grantor settlor or devisor to make the same provision for the children of other persons as for his own, except that as to the former they must be the children of persons who take an interest under "such conveyance settlement or devise" as is referred to in the clause.

The words "such conveyance settlement or devise" relate to the instrument by which the grantor settlor or devisor has made a provision for the portions, but it is not necessary that the gift to the parent should be in the very clause of the will which creates the provision for the children, or that there should be an interest in the very property directed to be accumulated.

*Semhle*, that however small the sum may be which is given to the parent, it would still be an interest within the meaning of the clause.

Cases may arise in which although an interest be given to the parent and some provision afterwards made for the children, that provision may not be made in the way of portions so as to bring the case within the exception in question.

The cases of *Eyre v. Marsden*, 2 Keen, 564, and *Shaw v. Rhodes*, 1 M & Cr. 135, and *S. C.*, on appeal, *sub nomine*, *Evans v. Hellier*, 5 Cl. & Fin. 1 observed upon.

Plaintiffs, from an order made by the Vice-Chancellor Sir *George Turner*, dated the 12th *July* 1852, on a Special Case stated for the opinion of the Court pursuant to the provisions of the Act 13 & 14 *Vict.* c. 35.

1852.

BARRINGTON

v.

LIDDELL.

The Case stated, among other things, that by indentures of lease and release, dated the 20th and 21st *April* 1823, being the settlement made on the marriage of the said Plaintiff, certain estates in the county of *Berks* were settled to the use of *H. T. Liddell* and Sir *R. Price* for a term of two thousand years upon certain trusts, and subject thereto to the use of *George Keppel*, the late Viscount *Barrington*, for his life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the said Plaintiff for his life, with remainder to trustees to preserve, with remainder to the use of the wife of the said Plaintiff to enable her to receive an annual rent-charge of 1500*l.* for her jointure, and subject thereto to the use of the first son of the said Plaintiff on the body of his said wife in tail male, with divers remainders over: the trusts of the term of two thousand years were declared to be, that in case there should be any child or children of the intended marriage other than an eldest son, whether born in the lifetime of the said *William Keppel*, (the Plaintiff, the present Viscount), or after his decease, and whether there should be issue male of the marriage or not, that then the trustees should after the decease of the survivor of the said *George Keppel* (the late Viscount) and *William Keppel* or in the lifetime of them or the survivor of them if they or he should so direct by any deed &c., by demising assigning or otherwise disposing of the hereditaments comprised in the said term of two thousand years or any part of such hereditaments for the whole or any part of such term, raise for the portion or portions of such child or children the sum or several

1852.  
 BARRINGTON  
 v.  
 LIDDELL.

sums of money after mentioned, namely, if there should be only one such child other than an eldest or only a son the sum of 20,000*l.* for the portion of such one child, and if there should be two such children then the sum of 30,000*l.* for the portions of such two children, and if there should be three or more such children then the sum of 40,000*l.* for their portions to be divided between or among the children for whom the portions were provided in such shares and to vest in and after the decease of the said *George Keppel* to be paid to such one child at such age or time as the said *William Keppel* should by deed or will &c. appoint, and for want of such appointment to an interest vested in such only younger child being a son at his age of twenty-one years, or being a daughter at her age of twenty-one years or marriage with consent &c., and the money to be paid to him or her on or at the same age or day if it should happen after the decease of the survivor of them the said *George Keppel* and *William Keppel*, but if such day should happen in the lifetime of the said *George Keppel* or *William Keppel* the survivor of them, then to be paid within six calendar months after the decease of the survivor of them and if there should be two such children and no more then the sum of 30,000*l.* for the portions of such two children, and if there should be three or more such children then the sum of 40,000*l.* for their portions to be divided between or among the children for whom the portions were provided in such shares and to vest in and after the decease of the said *George Keppel* to be paid to them respectively on or at such ages or days and to be subject to such limitations over for the benefit of some one or more of such children as the said *William Keppel* should by deed or will &c. appoint, and for want of such appointment, the sums of 30,000*l.* or 40,000*l.* were to be divided between such younger children to be vested as to sons at twenty-one and as to daughters at twenty-one or marriage with consent &c. in equal shares, and to be paid at such ages or days if the same should happen after the decease of the survivor of them the said *George Keppel* and *William Keppel* but if not then within six months after the decease

1852.

BARRINGTON  
v.  
LIDDELL.

decease of such survivor.—That there were ten children of the marriage, several of whom attained twenty-one years of age, the consequence of which was that the sum raisable under the term was 40,000*l.*—That *Shute* Bishop of *Durham*, the great uncle of the said Plaintiff, by his will, dated the 10th *December* 1825, recited that upon the marriage of his great nephew, the said Plaintiff, the said hereditaments in the county of *Berks* were limited to uses in strict settlement under some of which the daughters and younger sons of his said great nephew by his wife *Jane Elizabeth* Viscountess *Barrington* might eventually become entitled to a portion or portions amounting to 20,000*l.*, 30,000*l.*, or 40,000*l.* as the case should happen; and the testator bequeathed unto his executors therein named the sum of 15,000*l.*, upon trust that they and the survivors and survivor of them and the executors administrators and assigns of such survivor should within three calendar months next after his decease invest the same in the public stocks or funds of *Great Britain* or at interest upon government or real securities in *England* or *Wales* in their or his names or name, to be from time to time altered or varied into or for other stocks funds and securities of the like nature when they or he should think proper, and should accumulate all the interest dividends and annual income of the said trust-monies stocks funds and securities during the life of his said great nephew, or if his said great nephew should depart this life within the term of twenty years to be computed from his the said testator's decease, then the accumulation to be continued for so long a period as with the time that should elapse in the lifetime of his said great nephew would make up the full term of twenty years to be computed from his the said testator's decease, and upon the completion of the accumulation aforesaid, the trustees or trustee for the time being should stand possessed of and



1852.  
 BARRINGTON  
 v.  
 LIDDELL.


and interested in all the same trust-monies stock funds securities and accumulations upon trust to apply the same or a competent part thereof in satisfaction and discharge of the portions so intended for the daughters and younger sons of the testator's great nephew by the said Viscountess *Barrington* when and as the same respectively should become payable and in exoneration of the hereditaments charged therewith, and subject thereto upon and for the several trusts intents and purposes and with under and subject to the several powers provisoes and declaration in the will contained of the said testator's residuary personal estates then subsisting or capable of taking effect; provided always, that if before the expiration of the said period of accumulation, the accumulated fund should be of sufficient amount or value for answering the purposes aforesaid, the accumulation should thereupon immediately cease; and as to all the residue of the testator's personal estate, the testator directed that it should be divided into two equal parts; and the testator bequeathed one half of the said residue to his nephew the said *George* late Viscount *Barrington* his executors administrators and assigns, and the other half of the said residue to *Henry* Bishop of *Exeter*, *James Baker*, and *John Burley*, their executors administrators and assigns, upon trust from and after the decease of the survivor of the said *George* late Viscount *Barrington* and *Elizabeth* Viscountess *Barrington* then his wife, for all the children of the said *George* Viscount *Barrington* then born or thereafter to be born who being a son or sons (but not an eldest or only son) had attained or thereafter should attain twenty-one or who being a daughter or daughters had attained or thereafter should attain that age or marry, their respective executors administrators and assigns, to be divided between or among the said children if more than one in equal

1852.

BARRINGTON  
v.  
LIDDELL.

equal shares, and if there should be but one such child, then the whole should be in trust for that one child his or her executors administrators or assigns; and the testator thereby appointed the said *George* late Viscount *Barrington*, *William Keppel* Viscount *Barrington*, and *Augustus Barrington*, executors of his said will.—That the testator died on the 25th *March* 1826, and the late Viscount *Barrington* on the 3rd *March* 1829.—That by deeds dated the 17th *June* 1842 and the 7th *August* 1844, an undivided one-tenth part of the premises comprised in the term of two thousand years was with the consent of the Plaintiff assigned to *Augustus Barrington* by way of mortgage to secure the sums of 533*l.* 2*s.* and 721*l.* 14*s.*, the sums thus raised being for the advancement of one of the younger children of the Plaintiff.—That *George William Barrington*, the eldest son of the Plaintiff, having attained twenty-one years of age, the estate tail created by the settlement of 1823 was barred, and the estates were resettled upon other uses and trusts.—That the 15,000*l.* given by the testator upon trust for accumulation was duly invested to accumulate, and the accumulations on the 24th *March* 1847, being twenty-one years after the death of the testator, amounted to 35,622*l.*, and at the institution of the suit to 43,643*l.*—That the two sums of 533*l.* 2*s.* and 721*l.* 14*s.* still remained a charge on the premises included in the term of two thousand years.—That the said Plaintiff Viscount *Barrington*, and the other persons interested under the resettlement, (these parties being made co-Plaintiffs,) were desirous that by means of the accumulated trust fund the hereditaments comprised in the term of two thousand years should be exonerated from the portions or sums of money charged upon the said hereditaments under the trusts of the term.

Under

1852.  
  
 BARRINGTON  
 v.  
 LIDDELL.

Under these circumstances the Plaintiffs and Defendants, these latter being the trustees of the term and the parties interested in the residuary estate of the testator, sought the opinion of the Court on the following points :—First. Whether the trust for accumulation, so as aforesaid directed by the will of the said testator *Shute* Bishop of *Durham* deceased, is valid for the whole of the life of the said Plaintiff *William Keppel* Lord *Barrington*, or for the period only of twenty-one years from the death of the said testator, or for any and what other limited period, and to what extent is such trust for accumulation valid.—Second. Whether, according to the true construction of the said will and the said indentures of settlement of the 20th and 21st *April* 1825 the said accumulated trust fund or any and what part thereof and to what amount is now applicable in exoneration of the estates comprised in the said term of two thousand years created by the said last-mentioned indentures of settlement from the said portions or sum of 40,000*l.*, or in exoneration of the said estates from the said mortgage debts or sums of 533*l.* 2*s.* and 721*l.* 14*s.* and the interest thereof, and any other and what part or parts of the said portions or sum of 40,000*l.*—Third. Whether any and what appropriation, and whose names as trustees, ought to be now made of and what part of the said accumulated trust fund to answer and pay at any and what future time or times and what part or parts of the said portions or sum of 40,000*l.*, so as to exonerate and discharge the residuary estate of the said testator *Shute* Bishop of *Durham* deceased from all further or other liability in respect the trusts for accumulation of the said fund.—Fourth. In what manner is the income of the said accumulated trust fund, whether there be any appropriation or not to be dealt with until the estates are by means of the fund exonerated from the portions or sum of 40,000*l.*

Who is entitled to such income from the period when  
at all the trust for accumulation ought to have ceased.


1852.

BARRINGTON

v.

LIDDELL.

The Case was heard before the Vice-Chancellor Sir George Turner, in June 1852; and on the 12th July 1852, his Honor made an order declaring that the trust for accumulation directed by the will of the Bishop of Durham was not valid for the whole of the life of the Plaintiff William Keppel Viscount Barrington, but was valid for the period only of twenty-one years from the death of the testator; and also declaring that the accumulated trust fund was not nor was any part thereof then applicable in exoneration of the estates comprised in the term of two thousand years created by the indentures of settlement of the 20th and 21st April 1823 from the mortgage debts or sums of 533*l.* 2*s.* and 721*l.* 14*s.* and the interest thereof or any part thereof, or from any other part or parts of the portions or sum of 40,000*l.*; and also declaring that no appropriation ought to be then made of any part of the accumulated trust fund to answer and pay at any future time or times any part of the portions or sum of 40,000*l.* so as to exonerate and discharge the residuary estate of the testator from all further or other liability in respect of the trust for accumulation of the said fund; and also declaring that the income which since the 24th March 1847 (the expiration of twenty-one years from the death of the testator), had accrued or should thereafter accrue due in respect of the funds or sums which on the said 24th March 1847 constituted the accumulated trust fund and of the stocks funds and securities into which the same or any part thereof might have been converted or transposed ought to be held and applied by the Plaintiff William Keppel Viscount Barrington and Augustus Barrington, as the trustees and executors of the testator's will, as income arising from the testator's residuary

1852.  
  
 BARRINGTON  
 v.  
 LIDDELL.

residuary estate and be divided between and residuary legatees accordingly until the trust fund should after the death of the Plaintiff *William Keppel Viscount Barrington* be applied in part discharge of the portions or sum of exoneration of the settled estates, and the residuary legatees of the testator were entitled to income from the period when the trust for accumulation ceased to be valid as thereinbefore declared.

From this order the Plaintiff, Lord *Barrington* appealed to the Lord Chancellor as before praying that it might be declared that the accumulation was valid for the whole of the Plaintiff *William Keppel Viscount Barrington* the Court should be of opinion that the accumulation was valid for the period only of twenty years from the death of the testator, that it might be declared that the funds or sums on the 24th day of *March* 1847, (the expiration of twenty-one years from the death of the said testator) constituted the accumulated trust fund, or part thereof, were applicable in exoneration of the mortgage debts comprised in the said term of two thousand and the mortgage debts or sums of 533*l.* 2*s.* and 72*d.* the interest thereof, and that the residue of the mentioned funds or sums, after satisfying the mortgage debts and interest, ought to be applied in answer and pay at any future times when should be required any other part of the said trust fund or sum of 40,000*l.*, so as to exonerate and discharge the residuary estate of the testator from all other liability in respect of the said trust for accumulation of the said fund.

Sir *W. Page Wood* and Mr. *G. L. Russell*  
 Appellant.

They supported the contention raised by the prayer of the petition of appeal, arguing that the testator's intention was merely to create a fund to pay off the portions so far as could be done consistently with the rules of law, and that the direction to accumulate was valid within the exception contained in the second section of the *Thellusson* Act. They cited *Griffiths v. Vere* (a), *Halford v. Stains* (b), and *Bourne v. Buckton* (c). In reference to the manner in which the income of the accumulations should be disposed of after the twenty-one years, as distinguished from the income of the original fund, they referred to and commented on the cases of *O'Neill v. Lucas* (d), and *Crawley v. Crawley* (e), which were said to be in favour of that income going to the residuary legatees. They mentioned also *M'Donald v. Bryce* (f), and submitted that the Statute in question contained no directions applicable to this part of the case.

1852.  
BARRINGTON  
v.  
LIDDELL.

Mr. *Chandless* and Mr. *Greene*, for the Residuary Legatees, supported the decision of the Vice-Chancellor.

They contended generally, that the present case did not fall within the exception relied on by the Plaintiff, submitting that portions mentioned in the second section of the Act did not mean portions given by an antecedent instrument or other portions than those created by the person directing the accumulation; also that the provisions made by the Bishop of *Durham* could not be relied as portions, the children of Lord *Barrington* not being the objects of the testator's bounty though their father was; and further, that the words "such conveyance or settlement or devise," in the second section referred to

*Ves.* 127.

3 *Sim.* 488.

*Sim.*, N. S. 91.

(d) 2 *Keen*, 313.

(e) 7 *Sim.* 427.

(f) 2 *Keen*, 276, 517.

1852.

**BARRINGTON**  
v.  
**LIDDELL.**

to the settlement or disposition mentioned in the ~~first~~ section. They submitted further, that the provision ~~not~~ being for the testator's own children, it was necessary that the parent should take an interest in the property to be accumulated, or from which the accumulations were to be made, and that inasmuch as the parent took no such interest the case did not fall within the exception relied on. They also contended, that after the twenty-one years the residuary legatees were entitled to the income of the accumulations as well as to that of the original fund. (They cited and commented on *Show v. Rhodes* (a), *Halford v. Stains* (b), *Beech v. Lord St. Vincent* (c), *Morgan v. Morgan* (d), *Jones v. Maggs* (e), *Bourne v. Buckton* (f).)

Mr. *Glasse* appeared for the Trustees, but took no part in the argument.

Sir *W. P. Wood* replied.

---

*The* LORD CHANCELLOR.

Nov. 24.

The question raised in this case arises upon the will of the late Bishop of *Durham*, and involves points of considerable importance upon the construction of the Act commonly called the *Thellusson* Act.

It appears that certain family estates were, on the marriage of the present Plaintiff, settled to common uses in strict settlement, so as to give to the late Lord *Barrington* an estate for life, and then an estate for life to the present Lord *Barrington*: a term of years was also

(a) 1 *Myl. & Cr.* 135; S. C. on appeal, *sub nomine Evans v. Hellier*, 5 *Cl. & Fin.* 114.  
(b) 16 *Sim.* 488.

(c) 14 *Jur.* 731.  
(d) 20 *Law J., Chanc.* 109.  
(e) 9 *Hare*, 605.  
(f) 2 *Sim., N. S.* 91.

created for raising portions for the younger children of the marriage; and in the events which have happened, a sum of 40,000*l.* has become raisable, the condition being, that in case the children exceeded a certain number that sum should be raised, and the number of children having greatly exceeded the limit. 40,000*l.* therefore became a charge on the property, but did not become absolutely raisable in the present *Barrington's* lifetime, so as to charge his life estate, as he directed it to be raised: some parts, however, of these portions to a small amount have been paid by him, and are therefore immediately raisable; and these charges were made after the death of the Bishop of *Durham*.

1852.

BARRINGTON

v.

LIDDELL.

The Bishop of *Durham*, having no power over the settled estates but meaning greatly to benefit his family, by his will large provisions for his nephew and grand-nephew, the late and present Lord, and amongst other things, gave chattels of considerable value as well as lands to go with the settled estates, and directed a sum of 30,000*l.* to be laid out in the erection of a mansion house upon the settled estates: he then, by provision upon which the question arises, set apart a sum of 15,000*l.* for the purpose of relieving the settled estates from the portions to which they were liable under the settlement to which I have referred. The will recites, that upon the marriage of his grand-nephew the estates were settled in the way already mentioned so as to raise portions in certain events of 20,000*l.*, or 30,000*l.*, or 40,000*l.*, as the case should happen; and the testator then bequeaths to his executors 15,000*l.* in trust that they shall within twelve calendar months lay out those monies, and shall accumulate all the interest during the life of his great-nephew the present Lord, but if his great nephew should



1852.  
 BARRINGTON  
 v.  
 LIDDELL.

should depart this life within twenty years to be computed from his the testator's death, then the accumulation was to be continued for so long a period as was the time that should elapse during the lifetime of his great nephew would make up the twenty years to be computed from his the testator's death, and up to the completion of the accumulation aforesaid, the trustees were to stand possessed of the trust-moneys in trust to pay and apply the same or a competent part thereof in satisfaction of the portions and in exoneration of the settled estates charged with those portions, and subject thereto upon the several trusts declared of his residuary personal estate. There then followed a proviso of great importance in this case, by which the testator declared that if before the expiration of the said period of accumulation the accumulated fund should be of sufficient amount for answering the purposes aforesaid, the purposes being the payment of the 20,000*l.* 30,000*l.* 40,000*l.* as the case might be, the accumulation should thereupon immediately cease.

The first question which arises upon this will is what is the true construction of it, irrespective and independent of the *Thellusson* Act. The testator meant no doubt the accumulation to go on, if necessary, during the life of Lord *Barrington*; but he has expressly provided, that if the sum payable, whatever the amount might be, should become raisable before the expiration of that term, then, the object being answered, the accumulation should cease. He did not mean an accumulation during the whole life, he had no object to that; but he meant an accumulation for a particular period, in order to raise a particular charge: and further he directs that if Lord *Barrington* should die before twenty years have expired, the accumulation shall go on for twenty years, if (the proviso again overrides the directi

direction) that term shall be necessary in order to raise the money. It is here to be observed, that if Lord *Barrington* had died within twenty years after the death of the Bishop, and the money had not then been raised, and the remaining time to make up the twenty years would have been sufficient to raise the portions, the consequence would have been that the portions, whatever was the amount of them that could be raised in that time, would have been an immediately available fund: it was not necessary that the sum of 20,000*l.*, 30,000*l.*, or 40,000*l.*, should be actually raised: the testator wished it to be raised if the time would allow, but he meant that whatever could be raised within the period mentioned should be a fund applicable as far as it would go to the portions; he also directed the portions to be paid when and as they become due and payable. Looking, then, at the natural and proper construction of this will, it is simply this,—(the order of the clauses is of no consequence, the whole must be taken together),—the testator directs the accumulation to go on during the life of Lord *Barrington* unless the portions shall be sooner raised, the limitation being that if the portions can be sooner raised then the accumulation is to cease; so in the case already supposed of Lord *Barrington* dying before the twenty years and the accumulation then continuing for the remainder of the twenty years, if the portions were raised sooner than the expiration of the twenty years, the limitation would apply to this state of circumstances and the twenty years would cease.

There is nothing in what I have thus referred to which contravenes the *Thellusson* Act; it is a question simply of intention upon the construction of the instrument. The testator intended that whatever fund could be raised within the limit of his will should be at once applicable to the payment of portions; and if, for example,

20,000*l.*

1852.  
  
*BARRINGTON*  
*v.*  
*LADDILL.*

1852.

**BARRINGTON**  
v.  
**LIDDELL.**

20,000*l.* or 30,000*l.* only had been to be raised, it would have been raised within the legal limit, and the children would have taken their portions under the provisions of the will, without touching the *Thellusson* Act. Lord *Barrington* has, however, lived longer than the twenty years; this takes the case out of the direction of the testator in that respect, and brings within the terms of the Act. A sum of 35,622*l.* was accumulated during the twenty-one years allowed by the Act. That this 35,622*l.* has been properly and legally raised even within the terms of the *Thellusson* Act and that it is applicable to the portions, admits of no doubt; and the only question is, when, having regard to the circumstances just mentioned, it is to be so applied. Looking at the matter in a common-sense point of view, I should say that the testator has himself provided for the case, when he uses the words "when and as the same respectively shall become due and payable." It is, however, said by the learned Vice-Chancellor, whose judgment is entitled to very great attention, that, looking at the nature of the trust and the Statute combined, the portions cannot be payable during the life of Lord *Barrington*, because the direction is that the fund shall accumulate during the whole of the life of Lord *Barrington*, and that although the 40,000*l.* cannot be raised according to the Statute and according to the will within the life of Lord *Barrington*, yet, as the accumulation has been stopped by the operation of the Statute which also directs that the income of the fund sought to be accumulated shall go in a particular manner, the income of the 35,622*l.* will go in the direction so pointed out, and that therefore the 35,622*l.* itself cannot be applied during Lord *Barrington's* life to the payment of the portions. It would be very much to be regretted if that were the true construction of the will and of the Statute, because it would defeat every intention which the Bishop had, and which

he


he has clearly expressed, and expressed within the legal limit. We have already seen, that supposing a sum had been raised within the period allowed by law independent of the Statute, it would be applicable at once; and as the Statute only stops the accumulation and directs the application so long as the accumulation is directed contrary to its provisions, the point to be considered is, what is the duration of time pending which the accumulation is so directed.

1852.  
BARRINGTON  
v.  
LIDDELL.

It has been decided in the cases of *Griffiths v. Vere* (a) and *Longdon v. Simpson* (b) that although the Act says that these directions for accumulation shall be null and void, yet they are only made null and void *pro tanto*, that is, for the period which in the event shall be found to exceed the limit of twenty-one years; the consequence of which is that the fund will go over to the persons who but for the direction to accumulate would have been entitled, only during the time that the accumulation has been directed contrary to the intention of the Act. I therefore cannot bring my mind to see where the difficulty is in holding the fund in the present case to be at once applicable, because, although the Statute stops the accumulation and directs that the interest shall go to other parties during the time that the testator has contravened the provisions of the Act, yet it is not to go for any more time, and there is nothing to prevent the time being measured which is exceeded. What, then, is the measure of time that is exceeded: it is the time that it takes after the 35,622*l.* was actually raised till the 40,000*l.* was raised. As a measure of time a perfect rule is afforded, as the money happens to have been accumulated; but if it had not, I could have directed a computation,

(a) 9 *Ves.* 127.

(b) 12 *Ves.* 295.

1852.  
  
**BARRINGTON**  
 v.  
**LIDDELL.**

computation, and there would have been no difficulty ascertaining how far the Act of Parliament was convened. If the testator did not intend, as clearly did not, that the accumulation should go on for whole life of Lord *Barrington* if the portions could sooner raised, and the Act of Parliament steps in and cuts down the accumulation beyond the 35,622*l.*, then if I give to the Act of Parliament its full operation from the raising of that sum to the raising of the 40,000*l.*, I shall accomplish every intention which this testator had that the law will enable me to carry into effect, and put a sound and rational construction upon the Act. I shall give to the Statute its whole force without strain or pressure, and take from it no operation which the words naturally and properly have, while at the same time I shall give effect to the intention. I am, therefore, clearly of opinion, that, as regards this first point the 35,622*l.*, when and as soon as the 40,000*l.* is raised, became a fund applicable in the first instance to pay the portions of the children of Lord *Barrington* already payable, and would equally be a fund applicable for the payment of the rest of the portions when they became payable. In the meantime, of course, that is between the raising of the 35,622*l.* and the 40,000*l.*, the interest of the fund would go, according to the direction of the will, to the residuary legatees. The case will therefore stand thus, so far as the first section of the Statute concerned.

Then comes the very important question, namely what is the operation of the second section of the Statute, and whether it does or does not include this particular case. There has always been a great deal of difficulty felt in putting a sound construction upon this section: it was introduced into the bill in the House of Commons

**Commons**, but must have gone back to the House of **Lords**, and no subject has ever been more considered; **although**, therefore, nobody can deny that it is very **vaguely** and loosely expressed, yet it must be conceded, **I think**, that the greatest authorities of that day considered that it sufficiently expressed what their intention was. The words are certainly inaccurate, but they do not, **as it strikes me**, admit of very great doubt in their construction: they are, "That nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons; or to any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under such conveyance, settlement, or devise; or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given, as if this Act had not passed." In order to arrive at the true construction of this section, as it bears upon the present case, we have to consider, in reference to the former provisions of the Act, what the meaning is of the words, "that nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons."

1852.  
BARRINGTON  
v.  
LIDDELL.

**I observe** that the Vice-Chancellor was of opinion, and rested upon that opinion in coming to the conclusion that he did on the remaining part of the section, that the words, "or other person or persons," having reference to the first section of the Act, did not mean that a testator or grantor might provide for the debts of anybody but himself, but that they meant that any other person or persons might provide for his or their own debts. That is a conclusion to which I cannot come. I am of opinion that the true construction is to read the

1852.  
 BARRINGTON  
 v.  
 LIDDELL.

whole as one sentence. A man may, by his will, provide for the debts of himself or anybody else within the old limit: it is a praiseworthy thing to pay debts, and a man is not likely to provide gratuitously for the debts of any indifferent person, though he is very likely to provide for the debts of a father or son. The Legislature, then, meant that a man should, within the limit allowed by law be able to provide not only for his own debts, but for the debts of such other persons as he should think fit: it being perfectly certain that the power was one which it would not be very dangerous to entrust to anybody. It is clear also that the provision as to debts must relate to past debts; and nobody can deny that a man being able by his will under this Act to provide for his debts generally, this will include his future debts.

That being so, one of the grounds upon which the learned Vice-Chancellor relied is removed. The section proceeds, but I will read the whole sentence,—“That nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons; or to any provision for raising portions for any child or children of any grantor, settlor, or devisor,—.” Stopping here, I remark that the Vice-Chancellor of *England* decided in the case of *Halford v Stains* (a), that these latter words included portions already charged; and nothing can be more reasonable than that a man should have the power thus given. As far, then, as regards a grantor, settlor, or devisor, it is clear that portions already created, as well as future portions, are intended, although I agree that without the words “for raising portions,” the clause rather looks to future provisions than to any already created. Then there is no break in this clause (any more than there was in the other

(a) 16 Sim. 488.

**other** clause, between the words, "grantor, settlor, or **devisor**," and the words "or other person or persons"); **the** whole sentence that I am going to read is governed by **the** words, "or to any provision for raising portions," and it runs, "raising portions for any child or children of **any** grantor, settlor, or devisor, or any child or children of **any** person taking any interest under such conveyance, **settlement**, or devise;—." I think, therefore, it is perfectly clear, that whatever a grantor or settlor may do with regard to his own children, he may do with regard to the children of any other person as to past portions or future portions; because there is no distinction between them, except that the persons whose children may have portions provided for them by a grantor, settlor, or devisor, must be persons who take an interest under "such conveyance, settlement, or devise."

1852.  
BARRINGTON  
v.  
LIDDELL.

The question then arises, upon which the whole depends, namely, what is the meaning of the words "child or children of any person taking any interest under such conveyance, settlement, or devise." It has been repeatedly observed that the words, "under such conveyance, settlement, or devise," are very inaccurate; and certainly they are so, but they admit, I think, of an easy interpretation. It would be difficult, strictly speaking, to find the antecedent to the words "such conveyance, settlement, or devise;" but when the first part of the section has spoken of a man making provision by a gift, or a settlement, or a devise, calling him a "grantor, settlor, or devisor," where is the difficulty of construing them, if the mind of the framer of the Act is considered as having passed on to the instrument itself by which the grantor, settlor, or devisor makes the provision. But, taking that to be so, it was said that the words, "such conveyance, settlement, or devise,"  
make



1852.  
 BARRINGTON  
 v.  
 LIDDELL.

make it necessary that the gift to the person who is to take an interest under the conveyance, settlement, or devise, must be by the very clause which creates the portion. With that construction I cannot, however, agree; for, supposing it to be necessary that the parent should take an interest in the very property out of which portions are to be raised, and an estate was given by the first part of the will to a person for life, and the by the latter part of the same will, portions were directed to be raised for his children out of that very estate, case coming directly within the intention and word of the Act in their strictest construction,—to hold in such a case that because the estate for life was found in one part of the will, and the direction to raise the portions in another, the father did not take under the devise, would be a most violent construction and one not warranted by the words of the Act, and clearly contrary to what must have been its intention. There is no magic in the word “devise;” it means a disposition by will, and in the sentence “under such conveyance, settlement, or devise,” stands as representing the instrument in which it is contained. With regard to the words “conveyance” and “settlement,” the case is clear, and so as to “devise,” which is a disposition by will; and it cannot matter in what part of the instrument the particular interest which is created is found.

The great question, then, at last comes to this, what is the interest which a person whose children are to be provided for is to take under such conveyance, settlement, or devise. The Vice-Chancellor has held, as I understand, that it must be an interest in the very property which is directed to be accumulated: I can, however, collect no such intention in the Act; and nothing could have been so easy as to have expressed the intention

tion **if** it had actually existed. When the Legislature intended to provide for a case of that sort they particularly specify the property: thus, when speaking of the **time** which is allowed for accumulation, or beyond which there is a prohibition, they say it may be "during the **minority** or respective minorities of any person or persons who shall be living or in *ventre sa mère* at the time of the death of such grantor, devisor, or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the **deed**, surrender, will, or other assurances directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated." When, therefore, the Legislature meant to provide for the case of a person being entitled to the actual fund, they knew how to express their intention, and therefore when I find in this section that it **is** not to prohibit any provision for any child or children of any person taking an interest under such conveyance, settlement, or devise, I am compelled to say that the Legislature meant that a child should not be provided for unless an interest was given to the parent. Is there anything in this irrational, or requiring emendation or addition in order to give effect to it; I think not. Some definition was to be given of the parents of the children of strangers; and the Legislature, not intending to permit the provision to be made for everybody, said, that if a testator, upon the face of his will, made a person the object of his bounty, he might by the same will accumulate a fund within the limit allowed by law for the children of that person. This does not exclude the case of a man having an estate for life, for example, in a property given to him by will, and the portions being directed to be raised out of that estate for his children: that is the highest case that can be put, but the clause

is

1852.

BARRINGTON  
v.  
LIDDELL.

1852.  
 BARRINGTON  
 v.  
 LIDDELL.

is not confined to such a case only. A definition of who are to be the children of "other persons" was absolutely necessary; and I think that I do no violence to the words, and do not carry them, and I do not intend to carry them, beyond their plain and natural import in the view I have taken of their construction. The subjects of this country had a right by law to accumulate within a certain limit; but it was considered dangerous that the limit should in all cases be allowed to remain, and it was therefore restricted by the Act of Parliament: the same Act, however, specifies the cases to which the restriction shall not apply; and the being so, why am I to go beyond the words of the Act in order to do something which, if it had been intended, the Legislature would have expressed. Those who drew and passed the Act knew better what they meant than I can possibly conjecture: I intend, therefore, to do nothing by conjecture. In thus dealing with the Statute, I do no violence whatever to the terms of it; I am only putting a strict construction upon it, giving to every word its natural and proper import, but importing into it no new words, or in any way straining it to meet this particular case.

My opinion, then, upon the whole of the Act with reference to the settlement is, that the present is a case within the exception, and that these portions are properly raisable as being within the time limited by law, independent of the Statute.

With regard to the authorities which have been referred to, I will just advert to them before I conclude, though I do not see that any of them bear very closely upon the case. In *Eyre v. Marsden* (a), it was held that the case

was

(a) 2 Keen, 564.

was not within the exception : the grantor's children, for whose benefit the accumulation was directed, were not the children of any person who took an interest under the will, and Lord *Langdale*, besides, held that the accumulations were not for raising portions, properly so called : the parents of some of the children who took interests, had small annuities given to them for life out of the fund. Independently of the reasons given by Lord *Langdale*, as to which I say nothing, I should have been clearly of opinion, that if the parents of all the children had been provided for by small annuities out of the fund, that that would have been a clear case within the proviso, for the reasons which I have already given.

1852.  
BARRINGTON  
v.  
LIDDELL.

In *Morgan v. Morgan* (a), before the Lord Justice *Knight Bruce*, then Vice-Chancellor, there were specific legacies of considerable value given to a mother, and then legacies to the daughters of 5000*l.* each on their marriage, with all accumulations of interest thereon from the time of the testatrix's death ; and it was held not to be within the exception. There is a very short judgment indeed ; I do not know whether it is accurately reported, but it is so short that I cannot discover the precise grounds of the learned judge's opinion ; it does not however, I think, touch the present question, so as to affect the view which I take of the case now before me.

There is also the case of *Shaw v. Rhodes* (b) before the Lords Commissioners, and which has been referred to and relied upon in subsequent cases. The passage in which Mr. Justice *Bosanquet*, who sat as one of the Commissioners and assisted Lord *Cottenham* in the decision of the case, seems to fancy that the gift was not within the Statute, is in page 159 : he there says, " But inde-  
pendently

(a) 20 *Law J., Chanc.*, 109.

(b) 1 *Myl. & Cr.* 135.

1852.  
 BARRINGTON  
 v.  
 LIDDELL.

pendently of this answer" (about the children being illegitimate, and therefore that the parent was not provided for, which was not a fact before the Court) "I do think that the case falls within the meaning of the exception: where the whole rents and profits are given in the first place to persons during the lives of their parents with the exception of small annuities only, to be paid thereout to the parents themselves for their own lives, and a gift to the same persons after the death of their parents is superadded, to be paid out of the subsequent rents and profits, I cannot think that this superadded gift is to be considered, within the meaning of the Statute, in the nature of a portion to the children of persons taking an interest under the devise." The learned judge was, I think, here looking rather to what was a portion in the children, than to what was a sufficient interest in the parent, and what he says amounts to nothing more than an obiter dictum. Cases may no doubt arise in which, although an interest is given to the parent and some provision afterwards made for the children, the provision may not be made in the way of portions so as to bring them within the second exception; but in the instance before me, the provision is clearly made as portions, and I am therefore relieved from considering the point. Lord Cottenham, in giving his judgment in *Shaw v. Rhodes*, does not even refer once to the second exception, and therefore it was not considered: the case was, however, undoubtedly within it. The same cause came on by way of appeal in the House of Lords (*Evans v. Hellier*) (a); but the judgment is not very satisfactory, because Lord Cottenham simply refers to what he had before said. In the course, however, of the argument, the point I have just mentioned as to interest was referred to. The  
 counsel

(a) 5 Cl. & Fin. 114.

1852.

BARRINGTON

v.


LIDDELL.

el were arguing that it was impossible to conceive he Legislature could have meant to sanction an accumulation, made under the pretence that portions to be thereby provided for the children of a person; a mere legacy of small amount, one pound for life, under the will. Lord *Lyndhurst* said, "I think meaning of 'any interest' is any interest however small." Then counsel said, "The Act would be nugatory, if an interest of such small amount could be accumulated within the exception." Lord *Chambers* said, "Yes, and nugatory also, if words in a will giving even 5*l.* to the parent during the period of accumulation, would have no effect." No opinion was ultimately given upon the question, and the Lord Chancellor contented himself with referring to the judgment he had before delivered, which did not even touch it; but as far as any opinion was expressed upon the argument, there is no doubt that those two words considered, that however small the sum was given to the parent of children for whom portions were provided, it was an interest, and brought the case within the exception of the Act of Parliament.

In the case of *Jones v. Maggs* (a) was also mentioned, that was decided on the ground that the legacy was a portion; and I do not further refer to it, because the case before me is one in which the sums provided are portions, and not mere legacies.

On the whole, therefore, I think that the present case is untouched by decisions to which I am bound to pay real deference, independently of the opinion of the learned Judge of the Court below; and after the anxious consideration, I have come certainly in my own

(a) 9 *Hare*, 605.

1852.  
  
 BARRINGTON  
 v.  
 LIDDELL.

own mind to a very clear conclusion that it falls within the second exception of the Statute. The result, therefore, is that the fund must be applied in the way in which the testator directed, that is, so much of it as can be properly applied for payment of portions now raisable must be paid in satisfaction of them, and as other portions shall become raisable resort must be had to the fund for the like purpose. Beyond this, the fund will be in the same position as a common legacy given to provide for portions not yet payable with a residuary gift if the fund is wanted; the whole fund being raised, the interest of the portion of it not required would go to the residuary legatees. I must, therefore, reverse the decision of the learned Vice-Chancellor; and the declaration to be inserted in the order will be framed accordingly.

I will just add one observation. The parties have been allowed to come here with a Case for the opinion of the Court, but I do not consider myself bound to answer every question which they may have thought fit to put. Having stated my opinion on the Act of Parliament which is the great question, I consider that I have disposed of the matter.

1852.

**THE ATTORNEY-GENERAL v. THE MAYOR,  
BAILIFFS AND COMMONALTY OF THE CITY  
OF EXETER, &c. ;**

*June 12.*

**THE ATTORNEY-GENERAL v. THE MAYOR,  
ALDERMEN, AND BURGESSES OF THE CITY  
OF EXETER, THOMAS HILL LOWE, AND  
OTHERS, AND THE GOVERNORS OF THE  
HOSPITAL OF ST. JOHN ;**

and

**In the Matter of ST. JOHN'S HOSPITAL IN THE  
CITY OF EXETER ;**

AND

**In the Matter of the ACTS 52 GEO. III. c. 101, 5 & 6  
WILL. IV. c. 76, 3 & 4 VICT. c. 77.**

**THIS** was the petition of the Governors of the Hos-  
pital of *St. John*, and it stated in substance that  
by letters patent, bearing date the 2nd *June* 1637, after  
reciting therein that by a petition of the mayor, bailiffs,  
and commonalty of the city of *Exeter*, his Majesty was  
informed of their charitable desires to erect an hospital,

Before the  
*Lord Chan-  
cellor* LORD  
ST. LEON-  
ARDS.

By letters  
patent in  
1637, the  
mayor, re-  
corder, alder-  
men, and  
commoncoun-  
cil of the city

of *E.* were incorporated and constituted the Governors of the Hospital of *J.* and  
of its lands, revenues, and goods, with power to purchase and take other lands,  
and to have a common seal. The recorder was not a member of, though elected by,  
the corporation of the city : *Held*, that since the passing of the Act 5 & 6 *Will.*  
IV. c. 76, the corporation of the hospital was so far identical with the municipal  
corporation, as to be within the spirit, if not the letter, of the 71st section of  
that Act, and therefore (without deciding whether the corporation of the  
hospital any longer existed, or in whom the legal estate of the hospital lands  
was vested) that the administration of its trust estates was rightly transferred  
to the trustees, appointed under that Act, of the charitable estates of the mu-  
nicipal corporation.




1852.

THE  
ATTORNEY-  
GENERAL  
v.  
THE MAYOR,  
&c., OF  
EXETER.

to be called the Hospital of *St. John*, in the said city, for the maintenance and education of children and aged poor of the locality, his Majesty, affecting such pious and charitable works, and out of his royal inclination to promote and advance the same, granted to the said mayor, bailiffs, and commonalty power, license, and authority to erect, found, and establish in the house, called *St. John's Hospital*, and other the premises adjoining, Hospital House, for the habitation, relief and maintenance of such aged or impotent poor people, and so many children or aged or impotent poor people, and such other members and officers of the said hospital to the governors thereof and their successors, or the greater part of them, should seem meet; and that the governors should have power to place therein such master or head of the hospital, and number of poor people and children, and such other members and officers as to them or the greater part of them, for the time being should seem convenient. And his said Majesty further granted that the governors and their successors should have power to erect and establish in the hospital and premises a free grammar school, and a free English school, for the maintenance and education of poor children of the locality, as to the governors for the time being, or the greater part of them, should seem convenient, and likewise one or more learned, able, and sufficient person or persons to be schoolmaster or schoolmasters of the same school or schools, and one or more other able, sufficient person or persons to be usher or ushers thereof. And his Majesty further ordained that the hospital should be incorporated and called the Hospital of *St. John*, within the city of *Exeter*, founded by *Hugh Crossing*, Esq., and others, and thereby erected, established, and confirmed the same, to have continuance for ever, and appointed or ordained that the mayor, recorder, aldermen, and common council of the said

**said** city for the time being should be governors of **the** hospital, and of the lands, revenues, and goods **thereof**, and be incorporated by the name of the Governors of the Hospital aforesaid, with power to purchase **and** take lands, to sue and be sued by their said name, **and** to have a common seal.

1852.  
  
**THE**  
**ATTORNEY-**  
**GENERAL.**  
**v.**  
**THE MAYOR,**  
**&c., OF**  
**EXETER.**

The petition stated, that by an order made by the Lord Chancellor dated the 14th *September* 1836, upon the petition of the mayor, aldermen, and burgesses of the city of *Exeter*, and others, it was referred to the Master to appoint proper persons to be trustees of the Charity estates or property then vested in the Corporation of *Exeter*, or any of its members which were affected by the 71st section of the 5 & 6 *Will. IV. c. 76*; that in pursuance of that order, the Master, by his report bearing date the 31st *January* 1837, certified, that he approved of **and** had appointed *Thomas Hill Lowe* and sixteen other persons to be trustees of the Charity property, then vested in the Corporation or any of its members affected by the said 71st section, and which were particularly specified by the Master; that among the Charities so specified, the Master had included *St. John's Hospital*; that by an order of the Lord Chancellor made on the 4th *February* 1837, the report of the Master was confirmed, and that the trustees so appointed had assumed the management of the hospital, and of its estates and revenues.

The petition submitted, that the Hospital of *St. John*, **and** the estates and other property thereof, did not come within and were not affected by the 71st section of the *Act 5 & 6 Will. IV. c. 76*, inasmuch as the body corporate of the city of *Exeter*, or any one or more of the members thereof, did not at the time of the passing of the said Act stand solely or together with any person or persons

1852.  
 THE  
 ATTORNEY-  
 GENERAL.  
 v.  
 THE MAYOR,  
 &c., OF  
 EXETER.

persons elected solely by such body corporate, or so by any particular member, class, or description of members of such body corporate, seised or possessed for estate or interest whatsoever, of any hereditaments any sums of money, chattels, securities, or any of personal estate, in whole or in part, or in trust, or the benefit of any charitable uses or trusts, to executed for the benefit of the hospital, or otherwise connected therewith; but that the property and revenues of the Charity, and the control, management, disposition, administration, and disposal of the property, revenues, and affairs thereof, and of the Hospital, were entirely and altogether vested in the petitioners as a distinct and independent corporate body virtue of the letters patent incorporating the Hospital. The trustees so appointed having advertised their intention of electing a new Head Master, in the place of the then existing one who was about to retire, petition, after stating the readiness of the petitioners to act as the Governors, and to appoint a proper person as Head Master, prayed that the order of the 4th February 1837, might be discharged, so far as the same affected the estate, property, or revenues of the Hospital; and that it might be declared that the power of the petitioners, as Governors constituted under the letters patent, was not affected by the 71st section of the Act 5 Will. IV. c. 76.

Mr. Rolt and Mr. Fooks, in support of the petition.

We submit, that the Corporations of *Exeter* and *St. John's Hospital* are in fact two distinct corporations, having two distinct names of incorporation, with two distinct corporate seals, and created with two distinct purposes of existence. The mere accident of their component parts being identical could not have affected

their separate corporate existence; but where, as the fact is in the present case, they are not composed of the same individuals, there being the addition of the Recorder to the Corporation of *St. John*, it cannot be said that the natural members of the latter Corporation are the same as those who constitute the Corporation of *Exeter*, and they ought not to have been confounded; the one being a municipal, the other a charitable corporation, the latter is clearly neither within the letter nor the spirit of the Act 5 & 6 Will. IV. c. 76. The case of *Doe v. Norton* (a) is conclusive on the point, that the legal estate, of which the Corporation of *St. John* was seised, remained in them, and was not affected by the 71st section of that Act. We further submit, that even if the Crown had repealed the charter of the Municipal Corporation of *Exeter*, the Corporation of *St. John* would not thereby have been destroyed. The Act was addressed to the mischief arising from the possible admixture of charitable with borough funds, and was not intended to remedy abuses in the administration of charity estates. The 142nd section of the Act (the interpretation clause), coupled with the schedules to which it refers, clearly indicates the bodies corporate to which the Act applies, and serves to show that abstract charitable corporations such as that of *St. John*, are not within the purview of the Act.

1852.  
THE  
ATTORNEY-  
GENERAL  
v.  
THE MAYOR,  
&c., OF  
EXETER.

*Mr. Follett, contra.*

The charter, which provides for the existence and succession of the Corporation of *St. John*, designates it as to consist of the members of the City Corporation; and if the new Corporation of *Exeter* does not form the basis of the existence of the Corporation of *St. John*, the latter must

(a) 11 M. & W. 913.

1852.  
 THE  
 ATTORNEY-  
 GENERAL  
 v.  
 THE MAYOR,  
 &C., OF  
 EXETER.

must have ceased to exist, for it has no independent corporate existence. It was said that the fact of the Recorder being added, constituted a distinct existence; but inasmuch as the Recorder was an officer appointed by the Municipal Corporation, the case falls expressly within the provisions of the 71st section, and that officer being now appointed by the Crown, it is a grave question whether the Corporation has any principle of life left: certainly none as contemplated by the original charter. The 72nd, 73rd, and 92nd sections show that no money except what was part of the borough funds was to be received by the Municipal Corporation. The interpretation of the word "trustee" in the last section, "by whatever name they are designated," is quite comprehensive enough to include this corporation. The point on which reference was made to the case of *Doe v. Norton* (a) does not affect the question now before the Court, though it is to be observed that in that case the Court assumed that the equitable interest in, or right of administering the estates of, the Charity devolved on the Lord Chancellor.

Mr. *Rolt*, in reply.


The fact of the Recorder being now appointed by the Crown can make no difference; but in whatever manner he is appointed, he is constituted a member of the Corporation of *St. John*, which sufficiently distinguishes it from the Municipal Corporation, even if there had been no separate seal.

*The* LORD CHANCELLOR.

The Corporation of *Exeter* was incorporated under the title of the Mayor, Bailiffs, and Commonalty of the City of *Exeter*, and under that title it is dealt with by the Municipal Corporation Act, in the 2nd section of schedule

(a) 11 *M. & W.* 913.

dule (A.) to that Act. In the present instance, certain estates have been dedicated to charitable purposes ; the Crown has granted a charter to the effect that the Governors of the Hospital of *St. John* should be the mayor, recorder, aldermen, and common council of the city for the time being, and they were accordingly incorporated, to be called the Hospital of *St. John*. It is to be observed, that in the first part of the charter they were incorporated expressly as the mayor, bailiffs, and commonalty, and power was given to them as such to found the Hospital. That might be very well taken either as a separate incorporation, or it might have been considered in law a corporation for distinct purposes, though consisting of the same members. Speaking from recollection, I think the corporation of *London* is of the latter sort ; but undoubtedly there are cases where corporations of the same name, and consisting of the same component parts, have been taken to form different corporations for distinct and separate purposes, and having each a distinct seal, of course they would be treated as distinct corporations.

1852.  
  
 THE  
 ATTORNEY-  
 GENERAL  
 v.  
 THE MAYOR,  
 &c., OF  
 EXETER.

The question however before me is, whether the Corporation of *St. John*, which was existing at the time of the Municipal Corporations Act as trustee of the Charity, does or not fall within the provisions of that Act. The case of *Doe v. Norton (a)*, which has been relied upon by the Petitioners, is not applicable, because there were several demises, both by the old and the new Corporation ; the Court was only dealing with the legal estate, which they were of opinion was not taken out of the old corporate body by the statute ; they were not dealing with a question at all analogous to the present ; and I observe that Baron *Parke*, in delivering the

(a) 11 *M. & W.* 913.  
 L L 2


1852.  
 THE  
 ATTORNEY-  
 GENERAL  
 v.  
 THE MAYOR,  
 &c., OF  
 EXETER.

the judgment of the Court, did not at all dissent from the doctrine that the trust estate might have been dealt with by this Court under the 71st section of the Act.

No doubt there is a Corporation of *Exeter*, and mayor, aldermen, and common council, but then they exist in a very different character; they may have the same name, but they are a very differently constituted body. The Recorder is no longer appointed by the Corporation, but is nominated by the Crown: it may be a very considerable question whether under these altered circumstances of their condition the Corporation of *St. John* can be held to be existing or not as a Corporation: I do not decide that point; I have only to determine whether or not they fall within the provisions of the Act of Parliament.

I understand the argument to be, that the Act of Parliament does not deal with charities, and that, unless it does, I am not at liberty to adjudicate upon the present application. The Act of Parliament is singular in its phraseology; although it deals with the money, it does not affect the estate; but by sect. 1, it abrogates "so much of all royal and other charters, grants, and letters patent now in force relating to the several boroughs named in the schedules (A.) and (B.) to this Act annexed, or to the inhabitants thereof, or to the several bodies or reputed bodies corporate named in the said schedules, or any of them, as are inconsistent with or contrary to the provisions of this Act." So that, in point of fact, any part of the charter of *St. John's* Hospital inconsistent with the Act is repealed by the provision I have just read. The words "body corporate" are by the interpretation clause construed to extend to all bodies corporate named in either of the schedules (A.) and (B.).

It was anticipated and known that many of these corporations held trust estates, and that there had been great abuses of their trusts; and it was thought proper that they should no longer hold such estates. The object therefore was, to provide bodies to whom they should be committed. Parliament undertook that office, but it has not done so effectually, and trustees have been appointed by this Court. The Petitioners, however, have also contended, that unless I find the legal estate in the Municipal Corporation, I have no right to interfere; I do not apprehend that is necessary. The Act assumes that the old Corporation would fall into the new; the clause which applies is the 71st, which recites that "whereas divers bodies corporate now stand seised or possessed of sundry hereditaments and personal estate, in trust in whole or in part, for certain charitable trusts, and it is expedient that the administration thereof be kept distinct from that of the public stock and borough fund." It was assumed, therefore, by the recital, that charity estates vested in bodies corporate would, unless otherwise provided, fall into and become mixed with the borough funds: provision was consequently made by that Act, that where such body corporate was seised or possessed of any estate or interest whatsoever of any hereditaments or any sums of money, &c., in whole or in part, in trust or for the benefit of any charitable uses or trusts whatsoever, all the estate, right, interest, and title, and all the powers of such body corporate in respect of such uses and trusts, should utterly cease and determine on the 1st *August* 1836. It must be admitted that if instead of creating a new corporation the charter of the Crown had gone to authorize the then existing corporation to manage these trust estates, they would have fallen directly within the 71st section, because they would have been a corporation seised for charitable trusts, and the same body would have had the execution of the

1852.  
  
 THE  
 ATTORNEY-  
 GENERAL  
 v.  
 THE MAYOR,  
 &c., OF  
 EXETER.



1852.  
 THE  
 ATTORNEY-  
 GENERAL  
 v.  
 THE MAYOR,  
 &c., OF  
 EXETER.

the public duty of the general corporation and also the particular trust, and as such I apprehend the case would have been one directly within the test of the Act of Parliament. Here the Corporation of the Hospital is not managed by the same name, but it is composed of the same members, as the Municipal Corporation, with the addition of the Recorder (whether the Recorder can be said to be a part of the Municipal Corporation I do not say: I should think not); and I have to consider whether this Act of Parliament hits such a case? The Act says, "In every borough in which the body corporate, or any one or more of the members of such body corporate, in his or their corporate capacity now stands or stand, solely or together with any persons or person elected solely by such body corporate," &c. The intention was not only that all corporations aggregate which stood seised should fall within the Act, but that everybody who constituted in himself a corporation and was solely seised of property for charitable purposes should also be included. Perhaps in strictness this case does not fall within the very letter of the Act: this body standing seised of the charitable estates is not the very same body as that of the Corporation of *Exeter*, because the Recorder is added; but he was elected by the City Corporation, and that appears to me to bring this case directly within the letter of the clause which I have just read. Is there then in the Act anything to exclude this case from its operation? That there was a clear intention that it should be included, I think admits of no doubt. If, however, the present case does not fall within the letter of the Act, I am clearly of opinion that, looking at the interpretation clause, which declares that the word trustees shall be construed to mean "persons charged with the execution of a trust or public duty, by whatever name they are designated," and to the whole scope of the Act, this case is within the spirit of the Act, and within the mischief intended to be remedied.

1852.

**In the Matter of THE ROYAL BANK OF AUSTRALIA, and of THE JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849.**

*July 8.*


**ROBINSON'S EXECUTOR'S CASE.**

**T**HIS was an application on the part of *Anthony George Robinson*, the executor of *Joseph Phelps Robinson*, to discharge or vary an order of the Vice-Chancellor *Knight Bruce*, made on the 25th *March* 1851, whereby he confirmed the decision of the Master, retaining the name of *George Anthony Robinson* as executor on the list of contributories for 120 shares in the above Company. It appeared that previously to 1840, *J. P. Robinson* was a director of the Company and had, as a qualification for that office, taken and paid the deposit on twenty shares, and in respect of such shares had subscribed the deed of settlement. At a meeting of the directors of the Company on the 7th *August* 1840, it was resolved that each of the directors should render himself responsible to take, either by himself or through his friends, a certain number of additional shares within a definite

Before the  
Lord Chan-  
cellor LORD  
ST. LEON-  
ARDS.

*A. B.*, one of the directors of a Joint-stock Banking Company, was a subscriber for, and executed the deed of settlement in respect of, twenty shares of the Company, each director being obliged to hold twenty shares as a qualification. The

directors subsequently resolved, without the privity of the shareholders, to appropriate to themselves a certain amount of additional or credit shares, which they were to pay for by giving promissory notes for the amount for which each subscribed. *A. B.* agreed to take, and he gave a promissory note in payment for 100 of such credit shares; he also signed a letter, binding himself to pay the deposit and calls on them, but did not execute the deed in respect of them. Eight years after the execution of the promissory note, *A. B.* died, without having paid any interest on, or any part of the principal of the promissory note, but in the books of the Company credit was given to him in respect of dividends on the credit shares, and he was charged interest upon the promissory note. On the Company being wound up: *held*, that his executor was rightly placed on the list of contributories, not only in respect of the twenty shares, but also in respect of the 100 credit shares, although the creation of the credit shares was not warranted by the deed, nor were they in fact ever issued or allotted.

1852.  
  
 ROBINSON'S  
 EXECUTOR'S  
 CASE.

definite period, and they accordingly each wrote to ~~the~~ directors as a body a letter, of which the following is ~~a~~ copy, and the only variation in which was the amount ~~of~~ additional shares severally agreed to be taken:—

“Royal Bank of *Australia*, 2, *Moorgate-street*.

“*London*, August 7th 1840.

“Gentlemen,—In reference to the 100 shares in the Royal Bank of *Australia* which I agree to take in order to extend and secure the basis on which the establishment shall be placed, I hereby bind myself, at such time or times within four years from the date of the deed of settlement as shall be convenient to me to pay the deposits and calls on the said shares, with interest thereon at 5*l.* per cent., from the time appointed for the payment of the same until such calls and deposits shall be paid by me.

“I am, &c.,

“JOSEPH P. ROBINSON.


“To the Directors of the Royal Bank of *Australia*.”

*J. P. Robinson* gave his promissory note for 1000*l.* on account of the 100 shares. In the commencement of 1842 he went to *Australia*, where he died in 1848, having appointed *A. G. Robinson* the Appellant his executor. In 1847, the note was sent out after him for the purpose of having its amount recovered, but it was not honoured by him. In the ledger of the Company credit was given to him for dividends on these 100 shares, and he was debited with a like sum in respect of interest on the note. The deed of settlement provided by its fourth clause that the shares of the Company should be vested in the directors, who should have full power to allot, appropriate, reserve for, or dispose of the same to such parties, and upon such terms, and in such manner as they might think fit (*a*).

The

(*a*) Some other clauses of the deed of settlement will be found in the report of the next case, *Meux's Executors' Case*, *post*, p. 522.

The Company being wound up, the Master, on the 25th *February* 1851, placed *A. G. Robinson*, the executor, on the list of contributories, as well in respect of the twenty shares which *J. P. Robinson* had held as a qualification, as also in respect of the 100 credit shares. The executor appealed to the Vice-Chancellor *Knight Bruce* to limit the liability to the twenty shares, and on that notion being refused, it was now renewed before the Lord Chancellor.

1852.  
  
 ROBINSON'S  
 EXECUTOR'S  
 CASE.

Sir *W. Wood* and Mr. *Cairns*, for the executor, in support of the appeal.

It is clear that the liability of a shareholder cannot be altered by any act not in conformity with the deed, *Bosanquet v. Shortridge* (a) ; and there can be no doubt but that the directors, in appropriating the additional shares to themselves, were acting in contravention of the fourth clause ; nothing was done by the general body of shareholders confirming the arrangement which was adopted by the directors ; and in no case could *J. P. Robinson* have claimed any interest in the profits of the Company in respect of the 100 credit shares.

Mr. *Daniel* and Mr. *Roxburgh*, *contrà*, for the Official Manager.

The books of the Company show that *J. P. Robinson* has all along been credited with dividends and debited with interest in respect of the amount secured by the promissory note ; but if that is insufficient to bind him, the letter written by him, agreeing to take the 100 credit shares, coupled with the fact of his having given the promissory note, are conclusive as to his liability.

Sir *W. Wood*, in reply.

*The*

(a) 4 *Exch. Rep.* 699.

1852.

ROBINSON'S  
EXECUTOR'S  
CASE.


*The* LORD CHANCELLOR.

The main point which has been argued in this case, as in that of *Meux's Executors' case* (a), was as to whether the directors of this Company were bound by the transactions into which they entered, and by which they assumed to buy on credit a very large proportion of the capital of the Company. In my opinion the present case is not distinguishable from that of the other directors who took the additional or credit shares, except in the particular of the amount of shares so taken by Mr. *Robinson*.

It appears to me that these directors never could have sustained the appropriation of the credit shares or the purchases as they have been called, as a transaction binding upon the Company, if that transaction had been brought before the shareholders, and they had objected to its confirmation; although I am of opinion that the directors are bound as between themselves and the Company, notwithstanding the irregular nature of the transaction. They clearly were not entitled to allot to themselves a very large proportion of the capital of the Company, without bringing in a single shilling in aid of that capital,—only giving promissory notes payable at some distant period, debiting themselves with interest as it became payable on their several notes, and taking credit for the dividends to which they would properly have been entitled if they had actually made the payments. There is no doubt but that the whole transaction remained on paper only, while it was represented as a real transaction; for they publicly stated their liability to pay up a capital equal to 10% a share upon as many credit shares as they had respectively appropriated to themselves. I never will maintain in a court of justice such a transaction, the effect of which, if supported, would be that the directors would be at liberty, if the speculation

(a) *Post*, p. 522.

1852.

  
ROBINSON'S  
EXECUTOR'S  
CASE.

tion flourished, to insist upon it as a real transaction, and if it failed, to throw up the shares on the plea that they had entered into dealings which were not authorized or sanctioned by their deed. They are themselves bound by the transaction, although they are not entitled to enforce it against the general body of shareholders. Mr. *Robinson* in that respect cannot be distinguished from the other directors; he was a party to the original transaction; he knew that he had not paid, and he also must be taken to have been aware that without the aid of the fictitious capital representing the credit shares there was no other way in which it was possible for this concern to have gone on. If, for instance, at the first meeting, the directors had only represented the capital which was actually paid up, this Company, it is clear, must have stopped at once, and in that case the directors would have lost all their power and fancied benefit; but by misrepresenting the real, *bonâ fide* state of the concern, they led on the persons whose interests it was their duty to have protected, and I cannot allow any of the parties to such misrepresentation to escape from that common calamity of which they themselves have been the authors.

It appears that Mr. *Robinson* went to *Australia*, where payment of the promissory note was demanded of him; he was not in circumstances to pay it, and it was not thought right or prudent, taking into consideration the fact that he was intrusted with some care over the affairs of the Company, to press for payment, and therefore the note was not then enforced. But in the mean time, the Company's books, the entries in which were perfectly authorized and justified by Mr. *Robinson's* own acts before he went to *Australia*, show that he and his co-directors, with whom he concerted this improper transaction, were regularly charged interest upon the amount of their several promissory notes, and credited with dividends attributable to the shares for which the notes were given.

Order made by the Vice-Chancellor *Knight Bruce*, on the 16th April 1851, on the motion of *Thomas Maude* and *Alfred Turner*, the executors of *Thomas Meux*, whereby the decision of the Master, including their names in Class 5 of the list of contributories, in respect of 500 shares in the above Company, was reversed.

1852.  
MEUX'S  
EXECUTORS'  
CASE.

In this case, as in the preceding one of *Robinson's Executor's case* (a), it appeared that *Thomas Meux* deceased had subscribed for twenty shares, to qualify himself as a director of the above Company, and had written the same letter as *Robinson*, except that he (*Meux*) had agreed to take 500 of the credit shares. The following is a copy of the promissory note which he gave in respect of the 500 shares :—

“London, October 2, 1841.

“Five years after date, I promise to pay to the trustees of the Royal Bank of *Australia*, the sum of Five thousand pounds, with interest at the rate of 5*l.* per cent. per annum, value received.

“THOMAS MEUX.”

*Thomas Meux* died on the 30th January 1842, long before the note became due, and his executors, *Thomas Maude* and *Alfred Turner*, proved his will. The latter on the 24th February 1842, addressed the following letter to the directors of the Company :—

“I shall be obliged by your informing me, as executor of the late *Thomas Meux*, Esq., of *Bloomsbury Square*, what shares that gentleman held in your Company, and whether there is anything due to or from him in respect of them, as I wish, before proving the will, to ascertain the amount of Mr. *Meux's* property.

“I am, gentlemen, yours, &c.,

“ALFRED TURNER.”

To

(a) *Ante*, p. 517.

1852.

MEUX'S  
EXECUTORS'  
CASE.

To which the following answer was returned :—

“ Royal Bank of *Australia*, 2, *Moorgate Street*.

“ *London*, *March 2*, 1842.

“ Sir,—Your letter of the 24th *ultimo*, addressed to the directors, came before them this day at the meeting of the board, and in reply I am desired to state that the late Mr. *Meux* held twenty shares in the Royal Bank of *Australia*, of 50*l.* each, and on which 10*l.* per share has been paid.

“ I am, Sir,

“ Your most obedient servant,

“ GEORGE H. WRAY.

“ To *Alfred Turner*, Esq., 32, *Red Lion Square*.”

On the 27th *July* 1843, Mr. *Turner* again wrote to Mr. *Wray* in the following terms :—

“ Sir,—I shall feel obliged by your informing me if there is any and what interest due and receivable on the shares of the late Mr. *Thomas Meux*, in the Royal Bank of *Australia* to the executors, of whom I am one.

“ I am, Sir,

“ Your most obedient servant,

“ ALFRED TURNER.

“ To G. H. *Wray*, Esq.”


An answer was returned to that letter, informing him that a certain amount of dividend was due in respect of the twenty shares, but no reference was made to the 500 shares. The order for winding up the Company was made on the 26th *March* 1850.

It appeared in evidence that in the general ledger, under Mr. *Meux's* name, there were the following entries :—

“ Dr.



|                                    |   |         |
|------------------------------------|---|---------|
| “ Dr.                              |   |         |
| “ 1841, Dec.—To subscribed Stock . | . | £5,000  |
| 1842, Dec.—To Bills receivable .   | . | 5,000   |
|                                    |   | <hr/>   |
|                                    |   | £10,000 |
|                                    |   | <hr/>   |

1852.  
  
**MEUX'S**  
**EXECUTORS'**  
**CASH.**

|                                    |   |           |
|------------------------------------|---|-----------|
| “ Cr.                              |   |           |
| “ 1841, Dec.—By Bills receivable . | . | £5,000    |
| 1842, Dec.—By subscribed Stock .   | . | 5,000     |
|                                    |   | <hr/>     |
|                                    |   | £10,000 ” |
|                                    |   | <hr/>     |

The following entry also appeared in the book of entries of the proceedings of the Company, held in 1843 :—

“ At a meeting of the Royal Bank of *Australia*, held on Wednesday the 29th *June* 1843, present Messrs. *Sutherland, M. Boyd Connell* and *Mitchell*, the subject of the credit shares held by the late Mr. *Meux* was brought under the attention of the court, and, after full consideration, it was resolved, that they be cancelled.

(Signed) “ J. W. SUTHERLAND.”

The name of *Thomas Meux* to the promissory note was accordingly cancelled. The executors sold and duly transferred the twenty shares to a purchaser. *Alfred Turner* in his affidavit, sworn in the Master's office, said he never received any information, either from Mr. *Wray* or the directors, respecting the 500 shares ; and Mr. *Wray* in his examination said, “ I was manager of this bank at the latter end of *August* 1841. The late Mr. *Meux* was a director of the said bank from its projection. I received a letter from Mr. *Turner*, dated the 24th *February* 1842. I brought it under the consideration of the board on the 2nd *March* 1842 ; they directed me to reply to it, and  
I wrote

1852.  
 MEUX'S  
 EXECUTORS'  
 CASE.

I wrote a letter on that day to Mr. *Turner*. I was present with the directors on the 24th *June* 1842, and, in pursuance of their directions on that day, cancelled *Meux's* signature to his promissory note dated the 22nd *October* 1841, for 5000*l.* I never had any communication with Mr. *Meux's* executors as to the note on the 500 shares."

The following in substance are the clauses of the deed of settlement of the Company which are material to be stated. Clause 2 provided that "shares" should mean shares in the capital for the time being. Clause 3 provided, That the capital of the Company should be 1,000,000*l.* divided into 20,000 shares of 50*l.* each, and the proprietor of each share should bring in and pay to the Company the full sum of 50*l.* in respect of such share as and when called upon so to do in manner thereafter provided, the sum of money previously brought in or paid in respect of the same share being allowed as part of such sum of 50*l.*, and the capital for the time being paid and brought in should be used and employed in the business of the Company, and each of the proprietors should be entitled to the profits and liable to the losses of the Company in proportion to his shares. Clause 4 provided, That the shares of the Company should be vested in the court of directors, who should have full power to allot, appropriate, reserve for, or dispose of the same to such parties, and upon such terms and in such manner as they might think fit. Clause 5 provided, That the Court of Directors should cause the shares in the Company to be numbered, and should cause all such additional shares (if any) as should be created under the provision therein in that behalf contained to be likewise numbered, and should cause every share to be at all times distinguished by the same number by which it should have

1852.

MEUX'S  
EXECUTORS'  
CASE.

have been originally distinguished, notwithstanding any transfers or forfeitures which might have been made or taken place in respect thereof. Clause 10 provided, That the management of the Company and the business and concerns thereof, and the regulation, investment, and application of the properties, funds, securities, and money for the time being belonging to the Company, and the regulation and determination of the modes and terms of carrying on and transacting the business of the Company, and other matters and things whatsoever connected with or relating to the business and concerns of the Company, should be solely and exclusively vested and reposed in the Court of Directors, except as therein excepted or otherwise provided. Clause 30 provided that the Court of Directors might make rules for the disposition of the properties, funds, and securities of the Company as they should think expedient and proper. Clause 47 provided, That the Court of Directors might alter, vary, or transpose the properties, funds, securities, or monies of or belonging to the Company or any of them, or any part thereof, as they should think fit, and might make and give such orders in regard thereto, and also for the sale and other disposition of the said properties, funds, securities, or monies, or any part thereof, as to the Court of Directors should seem meet. Clause 50 empowered the directors to forfeit shares where parties should not have paid their calls. Clause 88 provided, That except where therein expressly provided, the person in whose name any share should stand in the share register book should to all intents and purposes be deemed at law and in equity the absolute and beneficial proprietor of such share, and the Company should not be bound or affected by any notice of any equitable claim thereto, or charge thereon. Clause 110 provided that the executor of any proprietor should not as such be a proprietor in respect of such shares, but he

1852.  
 MEUX'S  
 EXECUTORS'  
 CASE.

should be at liberty to dispose of them; or the Company might, upon an executor giving notice and complying with the provisions of the deed, become the proprietor and personally chargeable. Clause 114 provided that any executor who should refuse, after three months notice, to execute the deed, should be liable to the forfeiture of the shares.

Mr. *Daniel* and Mr. *Roxburgh*, for the Official Manager, in support of the appeal.

According to the authority of *Stanhope's case (a)*, *T. Meux*, if alive, would have been clearly liable; that being so, the subsequent acts between the executors and directors cannot affect the liability of the testator. The question is only between the directors and executors in their representative characters, and the estoppel can only extend to that which is personal. *Cockburn's case (b)* is distinguishable in this respect, that there the liability of the transferee was completely and effectually substituted for that of the transferor. The directors had no power whatever under the provisions of this Company's deed to extinguish any shares, and their act in cancelling *T. Meux's* promissory note, and the credit shares agreed to be taken by him, was a fraud on the general body of the shareholders; and so also was the answer sent by the secretary by the order of the directors to the executor for though generally directors, when acting within the scope of their authority, may be regarded as the agents of the shareholders, yet where, as in this case, they make representations which show a fraudulent intent to deceive, they cannot be regarded as the agents so as to bind the Company, and the loss, if any, must fall upon those who have been defrauded by such misrepresentation, *Burns v. Pennell (c)*.

Mr.

(a) 3 *De G. & S.* 198.

(b) 15 *Jur.* 28.

(c) 2 *H. L. Ca.* 497.

Mr. *Bacon* and Mr. *Busk*, for the executors, in support of the Vice-Chancellor's order.

1852.

MEUX'S  
EXECUTORS'  
CASE.

The general body of shareholders must be taken to have acquiesced in the representations of the directors as to the interest of the testator being limited to twenty shares, and the books of the Company clearly show that there was a valid transfer of those shares, and that there was no liability *ultra*.

Mr. *Daniel*, in reply.

The LORD CHANCELLOR.

The directors were not in point of fact authorized to deal with the property of the Company in the way in which they assumed to do. The 3rd clause of the deed requires that the capital of the Company shall be 1,000,000*l.*, divided into 20,000 shares of 50*l.* each, and that the proprietor of each share shall bring in and pay to the Company the full sum of 50*l.* in respect of such share, as and when called upon so to do in manner thereafter provided. I think the intention therefore was, that all the shares should be actually *bonâ fide* subscribed for as upon money payments, no doubt depending upon the periods when the directors should think it right to make the calls. The 4th clause may be considered perhaps as giving power to the directors to appropriate or reserve, not in terms, but in substance, for themselves and their friends, the whole of the shares; the words are "to such parties and upon such terms as they shall think fit," which rather looks as if they were to deal with third parties; but whoever might take them, the shares could only be taken subject to a general liability to pay for them as a money transaction, although the payment was to be deferred in the shape of calls till wanted.

M M 2

In

1852.  
 MEUX'S  
 EXECUTORS'  
 CASE.

In the present case the facts are, that a short time after the formation of the Company, not a great many shares having been taken, the directors (who appear to have been persons of consideration in the money market) agreed to appropriate among themselves a certain amount of what were termed credit shares, "in order to extend and secure the basis on which the establishment should be placed," though, as I understand it, they certainly very much narrowed it by confining the liability to advance money to a very few, namely, to the directors alone but whatever might be the effect, they entered into an engagement that they would take a great number of the credit shares; one director was to take nearly a third of the entire capital, and the other directors were to take various quantities, forming in the aggregate an enormous sum, and a very large proportion of the entire capital. The way in which this was carried into execution was not by allotting any of these credit shares, for there is no trace of any allotment in the books, much less is there any evidence of the transfer of any such shares; it was not in point of fact a real transaction as regarded a purchase of shares; what they meant to do was, to enter into an engagement between themselves, that as money would be required to sustain the concern, they would, in the proportions in which they had subscribed, make the advances upon what were called "credit shares," but which were in fact credit sales. These shares are entered in the books as 10*l.* shares; there was, however, no creation of any such shares; but supposing them to have been actually existing, there is no evidence to show that any one of these directors was entitled to any specific credit shares.

Up to the death of Mr. *Meux*, dividends were paid on the shares regularly allotted, but no dividend was ever paid on these credit shares; none was claimed, no calls were

were made, no payment of interest was ever made on the sums for which the directors had given their promissory notes. Within a few months after signing the promissory note, and long before it became due, Mr. *Meux* died. He was at that time a real holder, as a director, of twenty shares, and those shares were regularly entered in a separate account to his credit; the payments upon those shares were regularly given credit for; he had received dividends upon them; and when the executors sold them, there was a regular transfer of them, in precisely the same way as any other shares would have been dealt with and transferred by any individual shareholder. That shows therefore a dealing regularly with the shares which were created, but with respect to the cancellation of the credit shares which were neither created nor allotted, my opinion is, (though I am not called on to decide the point,) that that was not a regular transaction; it never was communicated to the shareholders generally.

1852.  
MEUX'S  
EXECUTORS'  
CASE.

[Mr. *Daniel* interposed, and submitted that the whole proceedings of the Company had been on the assumption that those shares were regularly issued, and that too with the privity of the general body of the shareholders, as appeared by the books of the Company.]

*The LORD CHANCELLOR.*—No evidence has been presented to me of any such privity on the part of the shareholders; although it is very objectionable to introduce fresh evidence after the conclusion of the argument, yet as it is alleged that there are facts in evidence which have by inadvertence not been brought to my notice, I will adjourn the further consideration of this case until to-morrow, to enable the appellant's counsel to supply the omission.

---

On this day the allegation of notice being unsupported

July 8.

1852.  
  
 MEUX'S  
 EXECUTORS'  
 CASE.

ported by the evidence, his Lordship, after having given his judgment in *Robinson's Executor's case* (a), proceeded:—There is this difference between the present case and the one I have just decided, namely, that in consequence of Mr. *Meux's* death in *January* 1842, he does not appear to have been credited with any dividends. In the *February* following, his executors applied to the directors for information as to the extent of his interest in the Company; that was the first step in the transaction, which, in its result the Appellant now seeks to impeach. It is to be observed, as an extraordinary circumstance, that although Mr. *Meux* was a man of business, and had taken, and made himself responsible for, 500 credit shares, yet that there does not appear to have been any entry or trace of any item respecting these shares in any of his private books, which would have led any one, more especially those with whom he was connected, to suppose he had entered into any such transaction.

The executors having applied, naturally enough, to the directors, before the proof of the will, to know what shares Mr. *Meux* their testator held, and whether there was anything due to or from him in respect of any such shares, the secretary, by the direction of the then acting directors, wrote a letter in answer, stating that Mr. *Meux* held twenty shares of 50*l.* each, upon which 10*l.* a share had been paid. It was argued, that this answer was one which called upon the executors to inquire further; but I think it called for no such inquiry. The statement was one on which the most prudent man might have acted, and on which he might properly have relied. In *July* 1843, the executors wrote again to know whether any dividend was due upon these twenty shares. It then appears that soon afterwards they sold and transferred the twenty shares; and th

(a) *Ante*, p. 517.



they believed, and had a right to believe, that they had no longer any liability or interest in the concern. Seven years after all this has taken place, an attempt is made to place these executors on the list as contributories, on the assumption that the estate of their testator Mr. *Meux* remained liable for the amount of the 500 credit shares.

1852.  
MEUX'S  
EXECUTORS'  
CASE.

The learned Judge in the Court below held that the representations of the directors in answer to the inquiries of the executors were binding upon the Company. It was contended before me, that the directors were not agents of the Company, or as such clothed with authority to make any misrepresentation, and that therefore any statement by them, which was contrary either to fact or law, would not be a statement obligatory on the general body of the shareholders. That, however, is not the nature of this case. Here all the directors had, without the knowledge of their shareholders, entered into an irregular transaction. So far as evidence has been laid before me, at the time when the first application was made by Mr. *Meux's* executors, there had been no representation to the shareholders at large, that there had been any paid-up capital realized or realizable from the shares so improperly taken by the directors. It remained at that time a transaction simply resting upon the promissory notes which had been signed by the directors, and upon the agreement between themselves; and in this stage it is material again to observe, that it never was a concluded transaction, and that there never were any shares issued and marked as they ought to have been according to the provisions of the deed, and that consequently there never were any particular shares which could have been considered as belonging specifically to any particular director. In this state of things the directors who had entered into this irregular transaction, (Mr. *Meux*, who was also implicated, being dead),  
are

1852.  
 MEUX'S  
 EXECUTORS'  
 CASE.

are the very body who cancelled that transaction so far as related to the estate or interest of Mr. *Meux*. Nevertheless having been communicated to the shareholders, it was an improper transaction, but up to that period no benefit had been derived from it, and no damage had been sustained by reason of it. Under these circumstances I should have great difficulty in saying that the surviving directors had not the power to rescind that which never had become a concluded transaction nor been represented to the shareholders at large as a transaction binding upon Mr. *Meux*.

That is one view of the matter; but it must be remembered that Mr. *Meux's* executors were persons who had to administer his assets. It was suggested that I might make such a declaration as would prevent the executors from sustaining damage; but that will not meet the justice of the case. The assets have been administered: I must look to the time at which this claim is brought; had it been asserted immediately after the occurrence of the transaction, I might have held that the executors could not be released, but it so happens that the claim is brought upwards of seven years after they have been released and the assets distributed; such a period of time having elapsed, it is impossible for me to enter into an inquiry of what has become of those assets, and to trace them through the different persons who may have enjoyed the benefit of the release. Such an inquiry might bring ruin upon many persons, to say nothing of the endless litigation which would inevitably arise in order to give to the general body of the shareholders of this Company a benefit to which, in my opinion, they are not entitled.

The shareholders would, without doubt, have repudiated the transaction if it had originally come before them.

them. I have given them, in the case I have just decided (*a*), the benefit of a contribution from the estate of *Robinson*, one of those directors who had continued their liability, and who had represented themselves, and been regarded by the general body of shareholders, as persons who had paid up their capital upon these credit shares; but the present case is totally different. Those directors, who were acting, I may say, both for and against the general body of shareholders in the beginning of this transaction, continued acting in the same double character; and having by the cancellation of Mr. *Meux's* signature to the promissory note rescinded that transaction, and having made the representations to his executors to the effect which it is in evidence they did make, I am clearly of opinion that the executors were released.

1852.  
MEUX'S  
EXECUTORS'  
CASE.

This is a case, no doubt, which tries the doctrine of law and equity very strongly, because Mr. *Meux* himself was an original wrong doer, and this release is to be obtained for the benefit of his assets. But it cannot be endured that any body of shareholders shall be at liberty to say that their directors are to make a representation upon the faith of which parties are to act and distribute assets, and that the general body are not to be bound by those representations. It would require a very strong case to induce me to release the general body from the effect of representations of directors, though improperly made, but which led to the distribution of assets. In answer to those seeking to recal the assets so distributed, I should be more disposed to hold that the directors who had made the misrepresentations should be personally liable to the general body for any losses sustained by reason of such misrepresentation, than to visit upon legatees the consequences of those misrepresentations.

I think,

(*a*) *Ante*, p. 517.

1852.  
 MRUX'S  
 EXECUTORS'  
 CASE.

I think, for the reasons I have stated, that the general body of the shareholders in this Company is bound by the representations of its directors, which representations were founded upon and perfectly consistent with the act of the directors in cancelling the promissory note and taking their act in connection with their representations, I am of opinion that the executors of Mr. Mux were properly discharged from all liability, and that consequently the decision of the Court below must be affirmed.

July 30.

LAKE v. CURRIE.

Before The  
 Lord Chan-  
 cellor LORD  
 ST. LEON-  
 ARDS and  
 The LORDS  
 JUSTICES.

Estates A. and B. were so settled that the testator had no power to deal with A., but had a power of appointment over B. By his will, made after the 1 Vict. c. 26, he referred to the settle-

THIS case, which was an appeal from a decision of the Master of the Rolls, came on to be argued by one counsel on each side, before the full Court of Appeal.

The Bill in the suit was filed by Gerard Warwick Lake, George Augustus Frederick Lake, Warwick Adrian Lake, and Augusta Frances Lake, all infants under the age of twenty-one years, by Sarah O'Hara their grandmother and next friend, against James Currie and Henry Towgood; and by the decree made on the hearing of the cause by the Vice-Chancellor of England, on the 23rd February 1849, it was declared that the trusts of a certain indenture hereafter mentioned, dated the 10th August 1841, ought to be performed and carried into execution, and then reciting that he had considerable freehold estates and might become possessed of more he devised all his real estates which he might die possessed to certain persons as trustees for purposes totally different from those of the settlement: he had not at the date of his will or his death any other estates besides A. and B. Held, that the testator must be taken to have known that he had a power of appointment over estate B., that the confirmation of the settlement operated only upon the estate A., and that the devise was a good execution of the power.

Observations on the operation of the Act 1 Vict. c. 26, on devises in execution of powers.

execution, and it was referred to the Master to inquire, among other things, whether the Right Honourable *Warwick Viscount Lake* in the pleadings named had made any and what appointment of the estate and premises mentioned in the first and second schedules to the indenture of the 10th *August* 1841.

1852.

*LAKE*  
v.  
*CURRIE.*

The Master, by his report, made in pursuance of the decree and dated the 31st *January* 1851, found, among other things, that by the indenture of the 10th *August* 1841, made between the said *Warwick Viscount Lake* of the one part, and the Defendants of the other part, the said *Warwick Viscount Lake*, for the considerations therein mentioned, granted released and confirmed, subject to a mortgage term of five hundred years previously created by an indenture of the 5th *July* 1832, unto the said Defendants and their heirs, certain freehold hereditaments in *Aston Clinton* in the county of *Bucks* therein particularly mentioned, to the use of himself for life, and after his decease to the use of the Defendants their heirs and assigns in trust for *Gerard Warwick Lake* the Plaintiff in the suit his heirs and assigns for ever, but in case the said Plaintiff should die under twenty-one years of age then upon the trusts therein mentioned, with an ultimate reversion in fee to the said *Warwick Viscount Lake*: and it was thereby further witnessed, that the said *Warwick Viscount Lake* did grant release and confirm unto the said trustees all and singular the freehold messuages lands tenements and hereditaments situate lying and being in the counties of *Bucks* and *Herts* respectively and particularly mentioned and described in the first and second schedules annexed to the indenture, and all the estate of the said *Warwick Viscount Lake* therein at law or in equity, to hold the said hereditaments mentioned in the first and second schedules with their appurtenances, subject to certain annuities charged thereon  
by

1852.


LAKE

v.

CURRIE.

by the will of *Edward Barker* deceased and subject also to a term of one thousand years created by a previous indenture of the 4th *July* 1839, to the use of the said *Warwick Viscount Lake* and his assigns during his life without impeachment of waste for his and their own use and benefit and with the powers thereafter expressed contained or referred to, and from and immediately after the decease of the said *Warwick Viscount Lake* to the use of the Defendants their heirs and assigns for ever upon trust for such person or persons for such interest or interests and generally in such manner as the said *Warwick Viscount Lake* should by his last will and testament in writing or any codicil or codicils thereto to be respectively executed and attested in the manner prescribed by the statute for the amendment of the laws with respect to wills direct or appoint, but in case no such direction or appointment should be made or being made the same should be a partial or incomplete direction or appointment or in case any appointment should be made in favour of any person or persons for any interest or interests determinable or defeasible upon events which must happen within the period allowed by law for the taking effect of a future or executory gift or gifts over upon a contingency, then and in such cases respectively and subject to the appointment, if any, upon trust in the discretion and of the proper authority of the said trustees to sell the same premises and to invest the proceeds in the public stocks or funds or upon government or real securities, and subject to the trust aforesaid upon trust for the Plaintiffs in the present suit in equal shares as tenants in common their respective executors administrators and assigns with benefit of survivorship between or among them in certain events therein mentioned, and if none of them should attain the age of twenty-one years or be married, in trust for the said *Warwick Viscount Lake* his executors administrators

administrators and assigns, provided always that it should be lawful for the said *Warwick Viscount Lake* at any time or times during his life by any deed or deeds to revoke and make void all or any of the uses trusts intents purposes powers provisoes and declarations thereinbefore expressed and contained concerning all or any part or parts of the said trust estate monies funds and premises which should be subject to the subsisting trusts of the now stating indenture, and by the same or any other deed or deeds to appoint declare or create any new or other uses trusts intents and purposes powers provisions and declarations concerning the trust premises to which such revocation should extend as to the said *Warwick Viscount Lake* should seem expedient notwithstanding anything thereinbefore contained.

1852.  
  
 LAKE  
 v.  
 CURRIE.

And the Master found two deeds, dated respectively the 18th *July* 1842 and the 1st *July* 1844, executed by the said *Warwick Viscount Lake* for the purpose of creating mortgages in fee of the estate and premises mentioned in the first and second schedules to the last indenture as a security for the repayment to *H. Binney* of two several sums of 3500*l.* and 1500*l.*, with interest at 5*l.* per cent., subject to reductions to 4*l.* 10*s.* per cent.

And the Master found that the said *Warwick Viscount Lake* made his will, bearing date the 5th *August* 1843, whereof he appointed *Elizabeth Lake*, of *Cambridge Street Edgware Road* gentlewoman, and her brother *John O'Hara* executors and trustees; and thereby, after making sundry specific and pecuniary bequests, and reciting that he had by a certain indenture, being dated and executed some time in or about the year 1841, declared certain trusts or otherwise had made certain provisions for the benefit of the said *Elizabeth Lake* and also of *Gerard Warwick Lake*, *George Augustus*

1852.

Lake  
v.  
Currie.

*Augustus Frederick Lake, Augusta Frances Lake, and Warwick Adrian Lake*, the children or reputed children of the said *Elizabeth Lake*, the said testator did thereby in every respect confirm the said indenture and the conveyance and assurance thereby made, and the trusts thereby declared, and the other provisions thereby made: and reciting that he was seised and possessed of considerable freehold copyhold and leasehold estate, and of other real and personal estate and effects, and might become seised and possessed of more, he proceeded to declare his will in the following words, (that is to say),—"Now I devise and bequeath unto the said *Elizabeth Lake* and *John O'Hara*, all my freehold copyhold and leasehold estates and funded property and all other real and personal estate and effects whatsoever and wheresoever of which I may be seised or possessed at the time of my death and not hereinbefore bequeathed, to hold the same unto and to the use of the said *Elizabeth Lake* and *John O'Hara* their heirs executors administrators and assigns, according to the several natures and tenures thereof, upon trust to be possessed of such parts thereof as shall consist of ready money upon the trusts hereinafter mentioned, and to collect and get in such parts thereof as may consist of money owing to me at the time of my decease: and as to the rest and residue of my said freehold copyhold and leasehold and other real and personal estate and effects other than monies invested in the public stocks or funds or other Government securities of *Great Britain* of which I may be possessed at my decease, upon trust that the said *Elizabeth Lake* and *John O'Hara* or the survivor of them her or his heirs executors or administrators or their or her or his assigns, do and shall execute all such conveyances and assurances and do or cause to be done all such acts and things as may be necessary or expedient for the purpose of giving full and complete effect in all things to the trusts in the said indenture expressed or declared and



1852.

*Lake*  
v.  
*Currie.*

to the other provisions thereby made, and subject thereto  
upon trust that the said *Elizabeth Lake* and *John*  
*O'Hara* or the survivor of them her or his heirs  
executors or administrators and their her or his  
assigns do and shall of their her or his own proper  
authority as soon as conveniently may be, nevertheless  
without prejudice to the provisions hereinafter contained,  
sell and dispose of the same residue of the said freehold  
copyhold and leasehold and other real and personal  
estate and effects either by public sale or private con-  
tract to any person or persons whomsoever and either  
at one time or at different times and either together  
or in parcels and under such conditions of sale and  
altogether in such manner as they he or she may be  
advised or deem to be proper, with power from time  
to time at their her or his discretion to postpone  
every such sale by public auction after the same shall  
have been advertised or to buy in the premises at  
any such sale or to rescind modify or vary any con-  
tract for sale of the same and afterwards from time to  
time of their her or his like authority to resell the  
same as if the same had not been offered for sale so  
that the same may be sold for the best prices in money  
that can be reasonably obtained for the same, and out  
of the money arising from any such sale in the first  
place to retain all such costs and expenses as my said  
trustees or trustee for the time being shall expend or be  
put unto in making such sale or sales aforesaid or in  
postponing or rescinding any sale or sales or otherwise  
in the execution of the trusts created by this my will,  
and do and shall stand possessed of the residue of the  
money to arise from such sale or sales and also of my  
ready money and of the money so to be collected and  
gotten in as aforesaid, upon trust in the first place to  
pay thereout all my just debts and funeral and tes-  
tamentary expenses and the said legacy of 300*l.* and all  
pecuniary

1852.  
LAKE  
v.  
CURRIE.

pecuniary legacies which I may give by any codicil or codicils to this my will, and as to the residue of the same monies, upon trust to invest the same at interest in their her or his names or name in the public stock or funds or other government securities of Great Britain or on real securities in England or Wales but not in Ireland, and to stand possessed thereof and of a stocks or funds or other government securities of Great Britain of which I may be possessed at my decease, upon the trusts following, that is to say, upon trust for such of them the said G. W. Lake, G. A. F. Lake, A. F. Lake, and W. A. Lake, as shall attain the age of twenty-five years, as joint tenants and not as tenants in common, and if only one of them shall attain that age, then for such only one:—and the will contained the usual powers as to maintenance and advancement; and the testator declared that it should not be incumbent on his trustees or trustee to sell any part of his freehold copyhold and leasehold or other real or personal estate except at such time or times as they in their absolute discretion should think fit; and he empowered his said trustees to demise or lease his freehold copyhold or leasehold estates for any term not exceeding twenty-one years in possession, upon the terms and conditions therein expressed; and the testator appointed the said Elizabeth Lake during her life, and after her decease the said John O'Hara or other the trustees or trustee for the time being of his will, guardian and guardians of the said G. W. Lake, G. A. F. Lake, A. F. Lake, and W. A. Lake.

And the Master found that the said Warwick Viscount Lake made two codicils to his said will, bearing date respectively the 24th day of June 1848, one of which was in the words and figures following, that is to say—"I bequeath to each of my daughters Isabella and Elizabeth Lake

in *Scotland* 2000*l.* and—:” and the other was words and figures following, that is to say,—“ I to be paid the sum of 100*l.* per annum, in half payments, for the term of her natural life.”

1852.  
LAKE  
v.  
CURRIE.

The Master found that the said will and codicils were severally and respectively executed by the said Viscount *Lake*, and such execution thereof respectively in the manner prescribed by the Statute for amendment of the laws with respect to wills; and that the said *Warwick Viscount Lake* died on or about June 1848, without having in any manner altered or revoked either of the said codicils, and without having executed any revocation or new appointment as hereinbefore appears; and that the said *Warwick Viscount Lake* was not at the time of his decease seised or possessed of any freehold or copyhold estate other than and except the freehold estate comprised in the said indenture bearing date the 10th August 1841, and was not at the time of his decease possessed of any leasehold estate or leasehold messuage at *Kensington* in the county of *Westminster*, held under an indenture of lease bearing date the 1st July 1815, for the residue of a term of years computed from the 25th March

in consideration of all the matters hereinbefore set forth; the Master found that the Right Honourable Viscount *Lake* did make an appointment of the said premises mentioned in the first and second schedules to the indenture of the 10th August 1841, the indentures of the 18th July 1842 and the 18th July 1844; and that the said *Warwick Viscount Lake* did not make any other appointment of the estate in

N N

D. G. M. and


1852.  
 LAKE  
 v.  
 CURRIE.

and premises mentioned in the first and second schedules to the indenture of the 10th *August* 1841.

To this report the defendant *James Currie*, on the 31st March 1851, filed an exception in respect of the finding of the Master hereinbefore set forth for that the Master ought not so to have stated or to have found, for that it appeared by the evidence before the Master and the Master ought to have found that the said *Warwick Viscount Lake* did in and by his said last will and testament in writing bearing date the 5th *August* 1843, duly appoint the estates and premises mentioned in the first and second schedules to the said indenture to *Elizabeth Lake* of *Cambridge Street Edgware Road* gentlewoman and her brother *John O'Hara*, to hold the same unto and to the use of the said *Elizabeth Lake* and *John O'Hara* their executors administrators and assigns, upon the trusts in the said will mentioned and contained of and concerning the same; and in particular the Master ought to have found that, by force of the said will or appointment, the legacy of 300*l.* thereby given and all pecuniary legacies which the testator Viscount *Lake* might thereafter give by any codicil or codicils to his will, became chargeable and raiseable upon from and out of the real estates comprised in the said first and second schedules to the said indenture; and that by the operation of the will or appointment and of the codicil of the 24th *June* 1848 the legacies of 2000*l.* by such codicil bequeathed to each of his daughters, the Honourable *Isabella Lake* and the Honourable *Elizabeth Lake*, became and were chargeable and raiseable upon from and out of the said last mentioned real estates; and that to that extent the will and codicil or the codicil operated as an appointment of the said estates.

This

This exception came on before the Master of the Rolls on the 12th *April* 1852, and on the 24th *April* 1852 his Honor overruled the same; and from this decision the defendant *James Currie* now appealed.

1852.  
  
 LAKE  
 v.  
 CURRIE.

Mr. Rolt, with whom was Mr. Campbell, for the appeal.

After stating the question as being, whether the two legacies bequeathed by the codicil were not by the will of Viscount *Lake* charged on the real estate mentioned in the first and second schedules of the indenture of the 10th *August* 1841, the testator having an express power to create such a charge though not referring to it, and observing that the case required the citation of no authorities, he contended that it was reasonably clear that the testator knew of the power; that the general confirmation of the settlement was no proof that he did not mean to exercise the power, and that either under the old or the amended law with respect to wills the disposition in question was a good execution of it; and that the general frame and plan of the will was consistent with the construction put on it by the Appellant. He distinguished the present from the case of *Cole v. Scott* (a), to which reference had been made as an authority by the Master of the Rolls.

Sir W. Page Wood, with whom was Mr. Chapman Barber, supported the decision appealed from.

The present question, whether considered with reference to the old or new law, is one of intention. Under the old law, if a man in terms gave all his estate, and he had no real estate except under a power, this was held to be an exercise of the power because it must necessarily have been so meant, but such an expression of intention was

(a) 1 *Mac. & G.* 518.

1852.

LAKE  
v.  
CURRIE.

was capable of being rebutted, and would have been rebutted, if in the same will the testator had confirmed, as the present case, trusts which the supposed exercise of the power would displace. It was to be observed that Viscount *Lake* had property on which the will would operate without reference to the power, namely the ultimate reversion of the *Aston Clinton* estate. The testator was not exact in speaking of his property, for he mentions copyhold estate, whereas it is found by the Master that in fact he had no copyhold: no argument can, therefore, be drawn in favour of intention from the fact of his disposing of freehold estate, as to which he may have made a similar error without in the least meaning to refer to the property subject to the power.

[The LORD CHANCELLOR observed that the testator was justified in speaking of copyholds, because in the settlement part of the lands in question were so designated, although in reality they were freehold.]

Under the old law no general bequest of personalty was a good exercise of a power, *Jones v. Tucker* (a) because the testator might have other property at his death on which the bequest would operate, without resort being had to what was subject to the power; and under the new law, where the will takes effect from the death, the same reasoning would apply as to real estate (He referred to *Attorney-General v. Vigor* (b), *Holmes v. Coghill* (c), *Jones v. Curry* (d).)

Mr. *Rolt* replied.


He contended that the rule under the old law was in favour of the Appellant, and that the new law clearly

(a) 2 *Mer.* 533.

(b) 8 *Ves.* 256.

(c) 12 *Ves.* 206.

(d) 1 *Swanst.* 66.

1852.  
  
 LAKE  
 v.  
 CURRIE.

threw on the Respondents the onus of proof that the testator did not intend to exercise the power; that the testator must be taken to have known that he had a power of some kind or other over the property; and that looking at the nature of the reversion in the *Aston Clinton state*, it was impossible to suppose that he contemplated dealing with that by the disposition in question.

*The LORD CHANCELLOR.*

The question which arises on this appeal is, whether the will and codicil of the late Lord *Lake* operate or not as an execution of the power reserved by the settlement of the 10th *August* 1841. Before referring to the facts of this particular case, I will state generally what I consider the law to be as applicable to cases of this kind, where, if there is an appointment at all, it is an appointment without express reference to the power. It is clearly settled that a general devise or bequest will not, independently of the late Statute, operate as an execution of a power; but it is also settled that where a testator disposes of real estate, not having any other than what is subject to the power, he is in such case to be taken as dealing with that estate, and that as to both realty and personalty, if the Court is satisfied by the manner in which the particular property is referred to that the testator intended to deal with that property, the disposition will be a valid execution of the power. The cases have gone upon very fine distinctions, but the general rule is clear.

It is said, however, that the late Statute, which makes a general disposition operate as an execution of a power and makes also the will take effect as from the death of the testator, has altered the law in this respect. It is argued that as before the Statute a general bequest of personalty could not operate as an execution of a power, because


1852.

**Lake**  
v.  
**Currie.**

because it would not be any expression of intention <sup>on</sup> the part of a testator who, although at the date of ~~his~~ will he might have no other property than that affected by the power, would yet know that the bequest would operate on whatever he might have at his death, so now, since real estate held by the testator at his death will pass by his will, the same rule must apply generally, and a disposition of realty will not operate as an execution of a power even where the testator has no other at the date of his will, because he may at his death have property which will be affected by the devise. The Statute however, so far from operating in this way, gives greater extent to the intention of testators, and provides as to general powers of appointment that they shall be deemed well executed by a devise, unless a contrary intention appears by the will. The intention was to extend and not to narrow the operation of devise, and therefore to hold that cases which before the Statute would have been an execution are not so now would be contrary to the whole scope of the Act; and if the new law is to operate at all it must be in favour of the appointment. It is now absolutely necessary to show a contrary intention to exclude the execution of the power, while under the old law it was needful to show the intention to exercise the power; the case is therefore stronger in favour of the appointees under the new than under the old law.

Bearing this state of the law in mind, the facts of the present case are these:—Lord *Lake* having two estates, the *Aston Clinton* and another estate, executed the settlement of the 10th August 1841, by which he conveyed the former to himself for life, with remainder to his son in fee, with an ultimate reversion to himself in fee: this was an estate therefore which the settlor would not calculate on falling in, and there is



1852.  
  
 LAKE  
 v.  
 CURRIE.

no power of appointment. Then the other estate was settled in trust, first for himself for life, then as he should appoint, and in default of appointment to sell out and out, and to pay the money arising from the sale to his daughters equally, with an ultimate trust for himself in certain events specified. Thus the *Aston Clinton* estate was settled absolutely, but the other estate was left so that it would not go to the daughters unless the settlor abstained from dealing with it. In this view of the case, and bearing in mind the difference of these two settlements, there is little difficulty in ascertaining what the testator meant to do by his will. What would he be likely to do? Dealing with the whole of his property and wishing to provide for his children, knowing also that the *Aston Clinton* estate would go to his son, he simply confirmed that disposition. As to the other estate he knew also that he had a power of disposition, for it must be borne in mind that he refers by his will to the settlement, and it is clear that by so doing he must be taken as knowing if not the exact terms yet at least the general effect of that settlement, and to have known also that the *Aston Clinton* estate was so settled that he could not disturb it, while over the other estate he had a power of appointment.

His Lordship here referred to the will, and to the recital and confirmation of the settlement, remarking that the meaning of the confirmation must be that the testator intended in no respect by his will to disturb the provisions of the settlement, and that the Court would be warranted in confining the confirmation to that part of the property which was settled absolutely.

His Lordship then read the next recital in the will, namely, that the testator was seised and possessed of considerable freehold copyhold and leasehold estate and of other

1852.

LAKE

v.

CURRIE.

other real and personal estate and effects and might become seised and possessed of more,—and after repeating the remark made in the course of the argument in reference to the use of the term “copyholds,” observed that the testator having then no other real estate but what was in the settlement clearly distinguished between other estates he then had and other estates he might subsequently acquire, and that he was perfectly correct in saying that he then had other estates, if the confirmation of the provisions of the settlement was limited to the disposition of the *Aston Clinton* estate. His Lordship then said :—

If I find estates A. and B. settled as in this case, and if a testator has power to disturb the settlement only as to B., and I find him by will confirming the settlement and then devising the estates, what must be the effect to be given under such circumstances to the disposition: it must be to make the confirmation apply to the estate the settlement of which could not be disturbed, and to give effect to the devise as to that estate of which the testator had power to dispose. In this way effect may be here given to every word in the will, and I construe the will and codicil just as if strangers only were the subjects of them.

His Lordship after commenting on other parts of the will, and showing that they were entirely consistent with the view of the case above taken, added,—With all respect for the learned Judge from whom this is an appeal, I entertain no doubt upon the case. I think the exception should have been allowed, and that there must be a decree that the will and codicil were a valid execution of the power of appointment over the estates in the trustees. The Lords Justices concur in the judgment I have given. The costs will come out of the estate.

1852.

**SHEFFIELD v. THE EARL OF COVENTRY.**

December 15.

**THIS** was an appeal by the Honorable *Thomas Henry Coventry* and the Honorable *William James Coventry*, two of the Defendants in the suit which was instituted for the administration of the estate of *George Earl of Coventry* who died on the 26th *March* 1831, on an order of the Master of the Rolls, dated the 2nd *August* 1852, made on a petition presented in the cause of the Plaintiffs and the present Appellants. The following are the circumstances under which the question was brought on for decision arose.

Before *The Lord Chancellor* LORD ST. LEONARDS and *The Lords Justices*.

A testator by his will directed his trustees to purchase a sum of Bank Annuities, upon trust to pay the dividends to his son *John* for life with a proviso against alienation, and he then provided that in case his said son should marry with the consent of his trustees, the Annuities should subject to the life interest of his son be settled for the benefit of any woman with

*George* Earl of *Coventry* made his will, bearing date 8th *July* 1818, whereby, after reciting among other things the reason for making his son *John's* portion greater than that of the other younger children, he gave and bequeathed the general residue of his personal estate and effects to the Plaintiffs, *Sir Robert Sheffield* and *Mary Pitches Boyce*, their executors administrators and assigns, upon trust to appropriate so much thereof as should be requisite for that purpose in the purchase of 20,000*l.* 4*l.* Cent. Bank Annuities, in trust for his daughters *Lady Barbara Coventry* and *Lady Sophia Gresley* respectively and their respective issue in manner therein mentioned ;

and his son should intermarry and the issue of such marriage in such manner should be agreed upon with the concurrence of his trustees, and subject to trusts to be declared in any settlement to be made on the marriage of his son in case none should be declared then the Annuities should go as his son should by will appoint, and the testator also provided that in case his son should die unmarried or having been married without leaving issue and without having exercised the power of appointment thereby given to him then a moiety of the Annuities should go to persons named in the will : the son died without ever having been married, and having by his will appointed a portion of the Annuities to two of his brothers :—Held, sustaining this appointment, that the events which had happened the son had a power of appointment over the Annuities.

1852.  
  
 SHEFFIELD  
 v.  
 THE EARL OF  
 COVENTRY.

and upon further trust, after the application of ~~part~~ thereof as thereinbefore directed, to appropriate ~~and~~ set apart so much thereof as would be sufficient to ~~pur-~~chase the further sum of 20,000*l.* 4*l.* per Cent. Bank Annuities, and stand and be possessed of and interested in the same Bank Annuities when so purchased ~~as~~ aforesaid, and receive the dividends interest and ~~annual~~ produce thereof, and pay apply and dispose of the ~~same~~ during the life of his son *John Coventry* to such person or persons and for such intents and purposes and ~~in~~ such manner as his said son should from time to time by any draft note order or writing signed by him, ~~but~~ not by way of anticipation, direct and appoint, and ~~in~~ default of or subject to any such direction or appoint-ment pay such interest dividends and annual produce into the proper hands of his said son for his sole use and benefit during his lifetime subject to the proviso next hereinafter contained, (being a proviso against alienation of the provisions thereby intended to be made for his said son or any part thereof). And the testator further declared his will as follows:--“Provided ~~also~~ and my will is that in case my said son shall at ~~any~~ time hereafter marry with the consent of my said ~~trust-~~tees or the trustee for the time being of this my ~~will,~~ then I direct that the said last-mentioned sum ~~of~~ 20,000*l.* 4*l.* per Cent. Bank Annuities, subject ~~never-~~theless to the life interest of my said son of and in ~~the~~ dividends interest and yearly proceeds thereof, shall ~~be~~ settled for the benefit of any woman with whom my ~~said~~ son shall or may intermarry and the issue of such marriage in such manner as shall be agreed upon with the concurrence of my said trustees or trustee for the time being, and subject to the trusts to be declared of and concerning the said Bank Annuities in any settlement to be made on the marriage of my said son or in case none shall be declared then I direct that the same Bank Annuities

1852.

SHEFFIELD

v.

THE EARL OF  
COVENTRY.

Annuities shall go unto such person or persons for such  
 estates and interest and in such manner in all  
 respects as my said son shall by his last will and testa-  
 ment or any codicil or codicils thereto to be signed and  
 witnessed by him in the presence of and attested by two  
 witnesses direct or appoint and be paid assigned or  
 transferred accordingly: Provided also and my will is  
 that in case my said son shall die unmarried or having  
 been married without leaving issue and without having  
 exercised the power of appointment I have hereby given  
 him, then I direct that the trustees or trustee for the  
 time being of this my will do and shall stand possessed  
 and interested in the sum of 10,000*l.* 4*l.* per Cent.  
 like Annuities, part of the said sum of 20,000*l.* like  
 annuities, in trust for all my children now born or here-  
 after to be born, other than and except my son Lord  
 Thurst, who shall be living at the time of the decease  
 of my said son *John* and the issue of any of my children  
 who shall happen to die in his lifetime leaving issue, to  
 be divided between or amongst them in equal propor-  
 tion share and share alike if more than one, save only

except that the issue of any deceased child shall take  
 between them such part or share thereof only as his her  
 father or mother if living would have taken"—

and a declaration as to the time of vesting of the  
 annuities in such children sons and daughters respect-  
 ively. And as to for and concerning the surplus of the  
 residue of his said personal estate, after making such  
 appropriations thereout as were thereinbefore directed,


said testator directed that the trustees or trustee for  
 the time being of his will should stand and be possessed  
 and interested in the same, upon trust that they or  
 the survivor of them his executors administrators or  
 assigns did and should appropriate and set apart so much  
 of such last-mentioned surplus as would be sufficient to  
 create a fund for the payment of certain annuities there-  
 inbefore

1852.  
  
 SHEFFIELD  
 v.  
 THE EARL OF  
 COVENTRY.

inbefore given to his wife *Lady Coventry* and his sister  
*Lady Ann Margaret Wright* (one of these annuities  
 lapsed by the death of the annuitant in the testator's  
 lifetime, and the other had since determined): and  
 after making the several appropriations aforesaid, upon  
 further trust that his said trustees or the survivor  
 of them his executors administrators or assigns should  
 stand possessed of and interested in such surplus, and  
 also from and after the decease of both or either  
 of the said annuitants of and in the fund so to be appro-  
 priated to answer and satisfy the same, in trust for his  
 children, except his son *Lord Deerhurst* and his said  
 son *John*, and the issue of such children in such  
 shares and proportions and to vest and become trans-  
 missible at such ages or times and to be subject to such  
 benefit of accruer and survivorship as he had there-  
 inbefore directed with respect to the share or shares  
 of such children and their issue of and in the said sum  
 of 10,000*l.* 4*l.* per Cent. Bank Annuities thereinbe-  
 fore directed to be transferred to them from and after  
 the decease of his said son *John*.

After the death of the testator and the institution  
 of the present suit, the sum of 20,000*l.* 4*l.* per Cent. Ann-  
 uities was purchased and carried over in trust in the cau-  
 se, to an account entitled "The Account of the Honorable  
*John Coventry*," and the interest and dividends of this  
 fund, subsequently converted by Act of Parliament first  
 into Annuities of 3*l.* 10*s.* per Cent. and afterwards into  
 3*l.* 5*s.* per Cent. Reduced Annuities, were paid to *John*  
*Coventry* down to the time of his death.

*John Coventry* died on the 24th *May* 1852 without  
 ever having been married, but having made his will, dated  
 the 28th *October* 1844, whereby, after reciting that he  
 was entitled under the will of his late father to the sum  
 of



of **20,000*l.*** **3*l.*** **10*s.*** per Cents. with a power of disposing of **the** same by will, but subject to a proviso that in case of his **dying** unmarried 10,000*l.* part thereof should be paid to **his** brothers and sisters equally, he gave and appointed **the** sum of 4000*l.*, part of that portion of the said stock over which he had power, to his brother the Honourable *William James Coventry* for his own use and benefit, without prejudice to his interest in the remaining portion of the said stock: and he gave and appointed all the residue and remainder of the said portion of stock unto his brother *Thomas Henry Coventry* for his own use and benefit.

1852.  
SHEFFIELD  
v.  
THE EARL OF  
COVENTRY.

The Petition on which the order now appealed from was made was then presented, praying for the transfer to the present Appellants of the portions of the 20,000*l.* Bank 3*l.* 5*s.* per Cent. Annuities appointed to them by the will of *John Coventry*. This Petition came on to be heard before the Master of the Rolls on the 2nd August 1852, when his Honor refused to direct the transfer prayed, and made an order, declaring that, in the events that had happened, *John Coventry* had no power of appointment under the testator's will over any part of the 20,000*l.* 3*l.* 5*s.* per Cent. Annuities. The object of the present appeal was to obtain the reversal of this declaration.

Mr. Rolt, Mr. Elmsley, and Mr. Leigh Pemberton, for the appeal.

They submitted that *John Coventry* had the power which he had exercised in favour of the Appellants, the very event provided for by his father's will having happened, namely, no trust of the fund being declared; that the proviso as to marriage with consent and trusts to be declared in that case was not the only matter referred to by the words, "or in case none shall be declared," but

1852.  
 SHEFFIELD  
 v.  
 THE EARL OF  
 COVENTRY.

but that the event of dying unmarried was also reacted by them; and on the Lord Justice Knight Bruce referring to the case of *Brown v. Higgs* (a) as being very similar to the present, they pointed out that in that instance there was a power only, whereas here it was a direct trust.

Mr. *Bethell* and Mr. *W. M. James*, for one of the residuary legatees of the testator, and in support of the decision of the Master of the Rolls.

They contended that the power of appointment was intended to be given only in the event of *John Coventry* marrying with consent of the trustees and no trusts being in that particular case declared; and that to say that it was to apply to the case of no trusts being declared generally, was inconsistent with the clause giving 10,000*l.* to the testator's other children in the event of *John Coventry* dying unmarried. In answer to a question put by the Lord Justice Lord *Cranworth* as to what would have been the effect of the son marrying without the consent of the trustees, they submitted that then the son would not have had any power to appoint.

Mr. *Follett* and Mr. *Osborne* appeared for other parties in the same interest, and supported the order appealed from.

Mr. *Rolt* replied.

*The LORD CHANCELLOR.*

In this case it seems very clear that the testator intended as regards the 20,000*l.* to make it a portion for his younger son *John*, with certain checks in consequence

(a) 8 Ves. 561, 570.



as one may suppose of want of providence in person; for, although he gives him a life interest, he fully provides that he shall not have a power to take. With the same view, and there being no gift of the property after the death of *John*, he makes the following provision in case he marries with her,—“Provided also and my will is that in case my said son shall at any time hereafter marry with the consent of my said trustees or the trustee for the time being of this my will then I direct that the said last-mentioned sum of 20,000*l.* 4*l.* per Cent. Bank Annuity subject nevertheless to the life interest of my said son and in the dividends interest and yearly proceeds thereof, shall be settled for the benefit of any woman whom my said son shall or may intermarry and the issue of such marriage in such manner as shall be agreed with the concurrence of my said trustees or trustee for the time being,”—Stopping at these words, there is nothing further provided for than a marriage with her, and a direction that the property shall then be settled in such manner as might be agreed on with the concurrence of the trustees. Then comes a sentence which I think may be read in a great measure as an independent sentence,—“And subject to the trusts to be declared of and concerning the said Bank Annuities or settlement to be made on the marriage of my son, or in case none shall be declared, then I direct the same Bank Annuities shall go unto such persons for such uses estates and interests and in such manner in all respects as my said son shall by his last will direct. The meaning is, that if the son married with the consent of the trustees, a certain settlement should be made, but subject to the trusts declared by such settlement, or in case none should be declared, the son should direct it by his will. That would effect every intention which this testator had: he wished to put such a check upon

1852.  
SHEFFIELD  
v.  
THE EARL OF  
COVENTRY.

1852.  
 SHEFFIELD  
 v.  
 THE EARL OF  
 COVENTRY.

upon his son as to prevent his anticipating, and to prevent also that any woman whom his son married should enjoy his, the testator's, property unless the trustees concurred; he meant also, not only that the son's issue should take, but that the son's power of disposition, subject to the issue taking, should remain. Although, then, I agree that by introducing a portion of the context, the view of the Respondents in this case may be supported, yet it can only be done by introducing also explanatory words in several places. For instance, before these words "or in case none shall be declared," the words "or upon such marriage" must be inserted: so again in the gift over, "or having been married without leaving issue," the words "or having married with such consent as aforesaid, and without leaving issue," that is, without leaving issue entitled under the settlement, must be added, for the case provided for would not harmonise with the limitation in the supposed settlement: it is an absolute disposition in case the son dies having married, saying nothing of consent, without leaving issue, which means at his death, whereas the settlement would provide for issue which had died in his lifetime. If, however, the whole context is taken, I see no difficulty in the case. The testator says,—if my son marries with the consent of my trustees, let there be a settlement such as the trustees shall agree upon, and subject to the trusts created by that settlement my son shall have power to appoint by will. The words are, "subject to the trusts to be declared of and concerning the said Bank Annuities in any settlement to be made on the marriage of my son." If the sentence had stopped there it would be a gift over in any event: in case he did not marry, or in case he died without a settlement, in either case he would have a power of appointment by will. The testator intended to put him on the footing of a favourite younger son, providing what should be done if he

1852.

SHEFFIELD

v.

THE EARL OF  
COVENTRY.

he married with consent, but not providing for a woman whom he might marry without consent, or for the issue of such a marriage. The testator meant that it should depend on the son's own testamentary disposition to make a provision for his wife and children if he married without consent, and if he married with consent, and the trust failed, that then also the trust fund should become subject to his disposition. I conceive that no violence is done to the will by taking that view. Looking also at the subsequent words, "in case none shall be declared," it becomes very difficult to say that any absolute trust had been previously imposed; because although the terms of the will seem to favour a settlement in case of marriage with consent, yet the finding of a positive disposition that if no trust is declared the son shall have power of disposing of the fund by will appears to remove the imperative direction, and to substitute the son's own will in place of that direction. I am therefore by no means prepared to say that this will did make it imperative on the testator's son to make any settlement which should be agreed on with the concurrence of the trustees: they might have consented to the marriage with a proper person, and might not have agreed to a settlement. The expression is, "in case none shall be declared," the word "none" referring to the trusts; and thus the testator first of all says, that his son is to have the power subject to the trusts to be declared concerning the Bank Annuities in any settlement to be made on his marriage with consent, and then that he is to have this power though he married with consent.

It was asked by one of the Lords Justices, what would have been the case if this gentleman had married without consent, and left issue. The answer necessarily was, to maintain the argument, that that issue would not have been entitled, that the son would have had no power,

1852.  
 SHEFFIELD  
 v.  
 THE EARL OF  
 COVENTRY.

and that the property would have gone over. ~~This~~ could not have been the testator's intention: when ~~he~~ himself says that he has provided for this son above ~~his~~ other sons, he could not have meant to cut him down to a life interest, and to leave his family penniless. What he did mean was, in different cases that might arise, to provide for giving him a testamentary power over the property. No violence will be done to the words "in case none shall be declared" by treating them as an independent sentence, and reading them thus,—“If my son marries with the leave of the trustees, then there shall be a settlement such as the trustees approve of, and subject to those trusts if any are declared, or if none are declared—” (applying that as well to a defect or a want of a declaration of trust in a settlement as to the case of there being no settlement, and therefore of course no declaration of trust)—“~~then~~ the property is to go as he shall appoint by will.” ~~Then~~ is this construction assisted or excluded by the ~~proviso~~ that follows,—Provided also and my will is that ~~in~~ case my said son shall die unmarried or having been married without leaving issue and without having exercised the power of appointment I have hereby given ~~—~~to him,” then I leave the trustees possessed of half ~~the~~ ~~sum~~ I have given to him. If this is to be read as ~~an~~ independent proviso it is very difficult to explain ~~the~~ sentence, for marriage generally had not been ~~pro-~~vided for but only marriage with consent, and the son might marry without consent. If, however, as I have observed, the whole context is taken, and each part of this will is brought to bear on the others, there is no difficulty. A clause of this sort was under discussion yesterday before the House of Lords, in the case of *Wilson v. Eden*, where, after limitations to a daughter for life and to her first and other sons in tail, it was provided, “that if it shall happen that my said daughter shall

1852.  
  
 SHEFFIELD  
 v.  
 THE EARL OF  
 COVENTRY.

leave no issue male of her body living at her death, or such issue male as shall be entitled by the true meaning of this my will to my real estates hereby limited settled as aforesaid, then in either of those cases I settle the estates to &c.," granddaughters living at this daughter's death. It had been there decided by the Court of Exchequer (*a*), that the failure of issue male referred to the whole sentence, that is, to the disjunctive or second alternative; but the Court of Queen's Bench (*b*) had been of a different opinion, and had read the second clause as an independent clause, and had thus held that the gift over took effect. The House of Lords, on my advice, decided in favour of the construction of the Court of Exchequer, and considered that the whole sentence was to be taken as one, that both events were governed by all the words in the clause, and that therefore the result was the same as if the words "shall have no such issue male as shall be entitled" had been "shall have no such issue male living at her death as shall be entitled." The adoption of a similar mode of construction in the present case would enable the Court without any difficulty, not as a regular rule of construction to be applied to every will, but upon the context of this will, to read the clause in question thus, "Provided also and my intention is that in case my son shall die unmarried or being married without leaving issue, and" (making the words apply to both alternatives) "without having exercised the power of appointment I have hereby given to me I give 10,000*l.* over." That renders the will sense throughout, and makes the two clauses harmonize with each other. I do not understand the ground on which this gentleman executed his power only as to 10,000*l.*, but I suppose a doubt having been raised on the

(*a*) 1 *Exch. Rep.* 772; see 11 *Beav.* 289.

(*b*) 14 *Jur.* 616.

1852.  
 SHEFFIELD  
 v.  
 THE EARL OF  
 COVENTRY.

the first part of the will, it was considered that a gift ~~by~~ implication arose in some way or other of 10,000*l.*, ~~and~~ 10,000*l.* only was given over; but I can find nothing ~~in~~ the will to justify that construction.

The conclusion I have come to, and in which ~~my~~ Lords Justices concur, is one satisfactory to my ~~own~~ mind, though I say this with the greatest deference ~~to~~ the learned Judge below, for whose opinion I have ~~the~~ highest respect. I feel, however, that in coming to ~~this~~ decision, we are executing the intention of the testator as manifested on the face of the will. The order ~~will~~ therefore be reversed, and there will be a declaration, ~~that~~ in the event which has happened *John* had a sufficient power to dispose of the property, and that it was ~~well~~ disposed of by his will.

---

December 15. In the Matter of The MONMOUTHSHIRE ~~AND~~ GLAMORGANSHIRE BANKING COMPANY, and of The JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849.

### CAPE'S EXECUTOR'S CASE.

Before *The*  
 Lord Chan-  
 cellor LORD  
 ST. LEON-  
 ARDS and  
 The LORDS  
 JUSTICES.

A transferee  
 of shares in a  
 joint-stock  
 banking

Company, Held on the winding-up of the Company, to be liable as a contributory in respect of debts incurred as well before as after the transfer, there being no provisions in the deed of settlement of the Company in any way limiting such liability.

THIS was a motion by way of appeal on behalf <sup>of</sup> *John Ebenezer Davies*, the executor of *John Cape* deceased, to discharge an order of the Master of ~~the~~ <sup>the</sup> Rolls, dated the 29th *July* 1852, by which his Honor had refused a motion by the present Appellant to discharge the certificate of the Master charged with the winding

ding up of the above Company, dated the 12th June 1852, placing the name of *J. E. Davies* on the list of contributories as the representative of *J. Cape*, in respect of one hundred and five shares held by *J. Cape* as transferred by purchase, and an order of the same date making all.

1852.  
CAPE'S  
EXECUTOR'S  
CASE.]

It appeared that the shares in question had been bought by *J. Cape* at different times, namely, fifteen on the 4th October 1841, thirty-five on the 28th October 1841, fifteen on the 30th November 1841, twenty on the 8th December 1841, and the remainder on the 8th December 1846; and that on occasion of each of these purchases, a transfer was prepared and executed according to the form and to the effect following:—“*Monmouthshire and Glamorganshire Banking Company.* This Indenture, made the                      day of                      in the year of our Lord 18      , between                      assignor of the shares hereinafter mentioned of the first part, *John Fraser* Manager of the *Monmouthshire and Glamorganshire Banking Company* of the second part,                      the assignee of the same shares of the third part, and *Joseph Beaumont* of the parish of *Llanarth* in the county of *Monmouth* Esquire and *Jeremiah Cairns* of *Newport* in the same county Esquire Trustees on behalf of the Company of proprietors of the said Banking Company,) of the fourth part: Witnesseth, that the said assignor, in consideration of the sum of                      £. sterling to him paid by the said assignee, doth, by the consent and approbation of the general board of directors of the said Company, testified by the execution of these presents by the said *John Fraser*, hereby assign and transfer unto the said assignee all the shares of him the said assignor in the capital stock of the said *Monmouthshire and Glamorganshire Banking Company* now standing in the name of the said assignor

1852.  
 CAPE'S  
 EXECUTOR'S  
 CASE.

assignor in the books of the said Company, and dividends benefit and advantage accruing from or incident to the same shares, to hold the same unto said assignee his executors administrators and assigns subject to the covenants and stipulations contained in the deed of settlement of the Company bearing date the 1st *August* 1836; and the said assignor doth with himself his heirs executors and administrators covenant with the said assignee, that, subject as aforesaid, the said assignee his executors administrators and assigns shall henceforth hold and enjoy the hereby transferred shares and all the dividends and profits thereof without interruption from the said assignor or any other persons whatever; and that the said assignor and all other persons claiming under him shall, on the request and at the cost of the said assignee his executors administrators or assigns, execute to him or them any further reasonable assurances of the said shares; and the said assignee doth for himself his heirs executors and administrators covenant with the said trustees, parties hereto, that the said assignee his executors administrators and assigns will observe all the covenants articles and stipulations contained in the said deed of settlement on the part of proprietors of shares in the said Company to be performed, as fully as if he the said assignee had been party to and executed the same, and will, whenever required by the general board of directors for the time being of the said Company, execute the said deed of settlement or any supplemental deed to be prepared under the authority thereof and any counterpart or duplicate of the same respectively. In witness whereof," &c.

The order for winding up the Company was obtained on the 13th *January* 1852; and *J. Cape* being dead, the Master placed the name of *J. E. Davies*, as his executor



1852.

CAPE'S  
EXECUTOR'S  
CASE.

in **class C.** of the list of contributories, in respect of the **shares**, and peremptorily ordered a call of 60% per share on **the** contributories named in that class. The debts of the **Company** which it was proposed to pay, or at least a **portion** of them, had been incurred previously to the **dates** of some of the transfers; and *J. E. Davies* contended that his liability as executor was limited to debts incurred subsequently to the transfers. The Master of the **Rolls** having agreed with the Master, the present **motion** was made in the first instance before the Lords Justices; but in consequence of the decision of *Sanderson's Case* (a), and *Dodgson's Case* (b), by the Lord Justice *Knight Bruce*, when Vice-Chancellor, the matter was reserved for discussion before the full Court of Appeal.

The Company, whose capital was 500,000*l.*, divided into 25,000 shares of 20*l.* each, was formed under the provisions of the Act 7 Geo. 4, c. 46, and its operations were carried on under a Deed of Settlement dated the 1st *August* 1836, of which deed the following are the clauses referred to in the argument and judgment as bearing on the point in question between the parties.

No. 9. "That no proprietor shall be allowed to sell assign or transfer any share, or to vote in respect thereof at any meeting of the Company, or to claim any dividend or bonus, or to exercise any other right or privilege under or by virtue of these presents, until the amount of any call or calls which may have been made in respect of his shares shall have been fully paid up and satisfied; nor shall any proprietor be entitled to vote at any meeting of proprietors whether general or local in respect of any share of which he shall not have been the registered

(a) 3 De G. &amp; S. 66.

(b) 3 De G. &amp; S. 85.

1852.  
 CAPE'S  
 EXECUTOR'S  
 CASE.

registered proprietor for the space of three calendar months at the least previous to such meeting."

No. 32. "That so much of the profits of this Company which shall be made for the period ending 31st Dec 1836 as the directors shall in their discretion deem expedient shall be retained, and form part of a fund be called 'The Reserved Surplus Fund;' and in each succeeding year during the continuance of this Company the net profits which shall arise and accrue to the Company, after setting apart such proportion, not exceeding one-fourth part of the said net profits, as the directors for the time being shall think requisite (for maintaining the said surplus fund), shall be divided amongst the proprietors in proportion to their respective shares; but no such part of the said net profits shall be set apart for the purpose aforesaid, if by reason thereof the dividend to be made for the current year would be reduced to less than 4l. per cent. per annum on the then paid up capital of the Company; and the surplus fund for the time being shall be carried to a separate account in the books of the Company, and the said fund is hereby declared to be as well a reserved fund of capital to meet any unforeseen emergencies, losses, or extraordinary demands upon the Company, as also a reserved fund of profits for the purpose of supplying from time to time any deficiency which, from unforeseen circumstances may arise in the profits of any year, and of preventing, as far as may be, a fluctuation in the amount of the dividends in successive years; and the said surplus fund shall and may be applied for the several purposes aforesaid by the directors, in their absolute discretion; and the said fund shall, on the dissolution of the Company, belong to and be divided amongst persons then entitled to the capital in the same shares as they shall be entitled to such capital."

No.

1852.

CAPE'S  
EXECUTOR'S  
CASE.

**No. 52.** "That it shall be lawful for the proprietors in the said Company or their legal representatives, whether by marriage or as assignees executors administrators or legatees, from the day of the date hereof to sell and transfer all or any of the shares of such proprietors, subject nevertheless to the approbation of two of the directors, such approbation to be testified by the execution of the deed of transfer of such shares by the manager or in case of his absence by such one of the directors of the Company as shall be in that behalf appointed by the board of directors; and in case at any time the said directors shall refuse to permit any transfer of shares to be made, then and in every such case the Company shall purchase the shares the transfer whereof shall be so refused at such price per share as shall be equal to the average price of the last ten transfers, and which shall have been entered in the register of the said Company immediately preceding such refusal as sold or transferred."

**No. 54.** "That the husband of any female proprietor, or the executor administrator or legatee of any deceased proprietor, shall not as such be a proprietor in respect of such shares as shall be vested in him in any of the aforesaid capacities respectively; but any such husband executor administrator or legatee shall be at liberty to dispose of such shares in manner and subject to the provisions herein expressed and contained, or at his option to become a proprietor in respect of such shares, first giving notice in writing at the banking-house of the Company at *Newport* of such his desire, in which notice shall be expressed the name and place of abode of the person giving the same, and the name of the proprietors in whose place or right he claims, and the number of shares in respect whereof he is desirous of becoming a proprietor; whereupon, and upon otherwise complying with the provisions herein contained, he shall

**any** shares not made conformably to the existing regulations of the directors shall be invalid in law and in equity, and every purchaser or transferee of shares shall in respect thereof, if required by the directors for the time being either expressly or by a general regulation in that behalf, execute these presents or some deed of accession to be prepared by the directors for that purpose, whereby he may enter into covenants with the trustees or registered officers for the time being of the Company duly to observe and abide by the stipulations provisions and regulations for the time being affecting or intended to affect holders of shares in this Company, provided that the fees payable to the officers of the Company for preparing registering and perfecting every such transfer shall not, exclusive of stamp duties, exceed the sums following, that is to say, for any number of shares not exceeding twenty the sum of five shillings, for any number of shares exceeding twenty and not exceeding fifty the sum of ten shillings, and for any number of shares exceeding fifty the sum of twenty shillings."

1852.  
 CAPE'S  
 EXECUTOR'S  
 CASE.

No. 57. "That every person who being a purchaser of any shares in the capital of the Company shall take a transfer or assignment of such shares, and shall not previously to such purchase have executed or otherwise acceded to these presents, and every person who, being the husband of any female proprietor or the executor administrator or legatee of any deceased proprietor, shall, by notice in writing as aforesaid, signify to the directors for the time being his desire to become a proprietor of the Company in respect of the shares vested in him in such capacity, and shall not at the time that the said shares vested in him in such capacity by the means aforesaid be a recognised proprietor in the Company in respect of any other shares in the capital, shall, as to all

1852.  
 CAPE'S  
 EXECUTOR'S  
 CASE.

all duties obligations claims and demands upon  
 against him in respect of such shares, be considered  
 proprietor in the Company from the time of the shares  
 being so purchased by or being so vested in him as afore-  
 said, but as to all profits rights and privileges benefits  
 and advantages to arise from the said shares, no such  
 person shall be considered a proprietor in respect of the  
 same until he shall have executed or otherwise acceded  
 to these presents."

No. 60. "That whenever, by any means whatsoever  
 any shares in the capital of the Company shall become  
 actually forfeited or shall be duly and effectually trans-  
 ferred to a new proprietor, then and in such case and  
 not before, the responsibilities of the previous owner  
 a proprietor in the Company in respect of such shares  
 shall cease and determine; and such previous owner  
 shall be exonerated and discharged from all subsequent  
 claims demands and obligations in respect of the  
 same shares, and from all future observance and per-  
 formance of the covenants conditions stipulations and  
 agreements of these presents in respect of the same  
 shares."

No. 69. "That if ever the losses of the Company  
 shall have absorbed not only the whole of the fund called  
 the surplus fund, but also one-fourth part of the paid-  
 up capital of the Company, the board of directors for the  
 time being shall, within twenty days or as soon after  
 such losses being incurred as the said board possibly  
 can, and they are hereby required to, call an extraordinary  
 general meeting of the shareholders in manner herein  
 mentioned and lay a statement of the affairs of the  
 Company before such meeting, when it shall be lawful  
 for any three or more of the shareholders of such meet-  
 ing to require the dissolution of the Company, and the  
 same

**same** shall be accordingly dissolved and the affairs **thereof** wound up in manner hereinafter mentioned, **unless** two-thirds in number and value of the **shareholders** qualified to vote as aforesaid, then and there **present**, shall be desirous of continuing and carrying on the **Company**, which they shall be at liberty to do upon **purchasing** the share or shares of the persons so being **desirous** of withdrawing from the Company at the then **estimated** bonâ fide value thereof, (such value being **determined** by arbitration as aforesaid if any difficulty **exist** respecting the same), and also upon indemnifying **such** retiring shareholders from the debts and **engagements** of the Company, and releasing them from the **covenants** clauses and agreements contained in these **presents** or in any subsisting deed of settlement of the **Company**, provided that nothing herein contained shall **extend** or be construed to extend to release such retiring **shareholders** from bearing and paying their respective **proportion** of the losses of the Company up to the day **of** such extraordinary general meeting.

1852.  
 CAPPE'S  
 EXECUTOR'S  
 CASE.

**Mr. R. Palmer** and **Mr. W. D. Lewis**, for the motion.

**They** contended, that in the absence of any provisions **to the contrary** in the Deed of Settlement, a new **partnership** must be considered as created whenever a new **partner** came into the concern, that is, whenever a **transfer** of shares took place, and consequently, according **to the ordinary rules** of partnership, there could be no **liability** in the new partner or transferee for any debts **incurred** before he became a member. They read and **commented** on the ninth, fifty-second, fifty-fifth, fifty-**seventh**, sixtieth and sixty-ninth clauses of the Deed **of Settlement**, and also the form of the transfer above **given**, and insisted that they contained nothing render-  
 ing an incoming partner liable for the previous liabilities  
 of

1852.  
 CAPE'S  
 EXECUTOR'S  
 CASE.

of the Company. In regard to authority as bearing on the present question, they submitted that *Sander-son's Case* (a), before the Vice-Chancellor *Knight Bruce*, was in favour of the Appellant, and that the judgment in *Dodgson's Case* (b), proceeding as it did entirely on the terms of the Deed of Settlement, was really a confirmation of the previous decision. They compared the present case to that of the sale of a lease, in which the vendor's right to an indemnity was confined to future breaches of covenant. In support and illustration of their general argument, they referred to and commented on, *Holme's Case* (c), *Shaw v. Fisher* (d), *Wynne v. Price* (e), *Humble v. Langston* (f), *Hawthorn's Case* (g); and they distinguished from the present, *Croxton's Case* (h).]

Mr. *Bethell* and Mr. *W. M. James*, for the Official Manager, and in support of the decision of the Master of the Rolls.

They relied on *Dodgson's Case* (b), and *Croxton's Case* (h), and drew the attention of the Court to the fact that the Company was formed under the provisions of the Act 7 Geo. 4, c. 46, by which the limit of the liabilities of the partners was expressly provided for, and urged that this fact ought to be carefully kept in view in adjudicating on the present question. They referred to and commented on the thirty-second, fifty-second, fifty-fourth, and sixtieth clauses of the Deed, and relied on the terms of the last of these, as showing that the purchaser was to take "responsibilities" as well as shares.

Mr.

- |                                                        |                                       |
|--------------------------------------------------------|---------------------------------------|
| (a) 3 De G. & S. 66.                                   | (e) 3 De G. & S. 310.                 |
| (b) 3 De G. & S. 85.                                   | (f) 7 M. & W. 517.                    |
| (c) 16 Jur. 803, since reported 2 De G. Mac. & G. 113. | (g) 1 De G. & S. 571; 1 Mac. & G. 49. |
| (d) 2 De G. & S. 11.                                   | (h) 1 De G. Mac. & G. 600.            |

*Mr. R. Palmer* replied.

*The LORD CHANCELLOR.*

It is quite clear that the law knows no difference between a common partnership of two people, or a partnership of one hundred. This Company is not an ordinary partnership, but one formed under the Act 7 Geo. 4, by virtue of which, though the public officer can be sued, yet all the members at the time when judgment is obtained may in the result be made liable. There is therefore a great difference between a Company and as this taking the benefit of the Winding-up Act, and the case of a common partnership so doing. This, however, does not exclude from consideration the provisions of the deed of partnership; but supposing that nothing there concluded the matter one way or the other, I should consider that the proper construction would be that the purchaser buying shares was to take them as they stood, subject to the state of the concern at the time of his purchase.

The capital in this Company being 500,000*l.*, divided into 25,000 shares of 20*l.* each, it is in effect contended by the Appellant that any purchaser of a share could insist on an account being taken as at the time of his purchase, in order to ascertain, in the case of any calling made upon him, whether that call was justified by the state of the account. The result, if the contention at the bar is correct, would be, that an account such as I have stated must in each instance be taken in order to show whether the call made was required to provide for past liabilities, or for future wants. No concern could possibly go on upon such a plan as this; and it would require, therefore, something very strong in the Deed to induce this Court to say that a purchaser did not take the shares bought by him subject

1852.

CAPE'S  
EXECUTOR'S  
CASE.



1852.

CAPE'S  
EXECUTOR'S  
CASE.

ject to all the liabilities at the time. It is the state of solvency of a Company like this that constitutes the value of its shares in the market; and supposing a man to buy a twenty pounds share in this particular concern, he would apparently buy a share in capital of 500,000*l.*, but if at the time there was ~~no~~ such capital, there being a large loss ascertained and written off, yet he could not complain, for the price he gave would be proportionably less on that very account. In the present instance, however, there is a reserved fund, and in this it is admitted that the purchaser would have his right to share, so that, to this extent, there must be clearly a liability to share also in the debts. If, then, the case depended upon the simple general rule independently of the clauses of the Deed, my opinion would be that a person buying a share in the Company must also take a share in its debts and liabilities as he finds them.

As to the clauses of the Deed, they seem to me to favour the conclusion I have just expressed, and I see no one which does not do so. The sixtieth clause is the one which bears mainly on the question, and it provides that whenever any shares "shall be duly and effectually transferred to a new proprietor, then and in such case, and not before, the responsibilities of the previous owner as a proprietor in the Company in respect of such shares shall cease and determine." Supposing that the clause had stopped here, the meaning would be quite clear; the word "responsibilities" applies in the only way in which it could apply, namely, that the previous owner, while he was proprietor, had incurred liabilities to which he was not to be liable on a transfer being effectually made to a new proprietor. The clause then proceeds to state that "such previous owner shall be exonerated and discharged from all subsequent claims demands and obligations in respect

of the same shares, and from all future observ-  
 id performance of the covenants conditions stipu-  
 and agreements of these presents in respect of  
 ie shares." These words do not, I think, intro-  
 ny difficulty: the language used is perfectly  
 e, for the claims and demands referred to may  
 ther out of previous responsibilities or in respect  
 equent contracts, and as to the deed of partner-  
 e transferror of the shares is discharged from all  
 liability for the observance of its provisions. It  
 to be observed, that by the fifty-seventh clause no  
 is to be considered a proprietor until he shall have  
 d or acceded to the partnership deed. When,  
 re, a purchaser executes the deed of transfer, he  
 s bound as from the commencement of the part-  
 . If this Court was to hold contrary to what has  
 ld in the Court below, a blow would be given to  
 tions of this nature, for it would be impossible  
 ger to deal with shares in Joint Stock Companies,  
 manner in which they are now dealt with.

1852.  
 CAPE'S  
 EXECUTOR'S  
 CASE.

nothing about the authorities which have been  
 l to, as I am of opinion they do not touch the  
 case. *Croxton's Case* (a) depended upon the  
 ar clauses of the Deed, and I thought it so free  
 oubt, that I did not call on the counsel for the  
 dents. The present case is also, I think, not open  
 doubt, and I have given my opinion upon it with  
 concurrence of the Lords Justices, who agree with  
 t the appeal must be dismissed, and with costs.  
 ot said anything about the form of the transfer,  
 appears to me to be in favour of the view which  
 irt has taken.

(a) 1 *De G. Mac. & G.* 600.

1852.

Dec. 18.

## KERR v. THE MIDDLESEX HOSPITAL.

Before *The Lord Chancellor* LORD ST. LEONARDS and *The Lords Justices*.

A testator by his will gave certain annuities in the following terms: "I desire that my executors shall purchase annuities for each of my two sisters, *E. B.* and *E. F.*, of 100*l.* a year each, the said annuities to be purchased in the British Funds." After giving other annuities *simpliciter* and legacies, the testator added, "I direct my landed property at *O.* to be sold, and the produce to go to the carrying out of the

THIS was an appeal by *Eliza Byrne*, one of the ~~De~~ fendants and annuitants under the will of ~~Sir~~ *J. De Courcy Laffan*, from the decree of the Master of ~~the~~ Rolls, on the 12th *June* 1852, whereby it was declared that, according to the true construction of that ~~will~~, the annuity thereby bequeathed to the Appellant ~~was~~ determinable upon her death. The following are ~~the~~ testamentary instruments under which the question arose.

"In the name of God, Amen. I, *Joseph De Courcy Laffan*, Baronet, of *Otham* in *Kent, England*, do ~~make~~ this my last will and testament, revoking and annulling all former testamentary papers. I leave all my property, of whatever kind it may be, in *England* or elsewhere of which I shall die possessed, to *Thomas Knox*, Earl of *Raufurly*, in *Ireland*, and *Charles Kerr*, Esq., of the house of *Fletcher, Alexander, & Co.*, of *King's Arms Yard, London*, and *Henry Houndle*, Esq., of the Adjutant-General's Office, Horse Guards, *London*, to have and to hold the same in trust for the following purposes. I leave to my well-beloved daughter-in-law, *Frances Logier* (daughter of my late wife and Colonel *Michael Symes*), and now married to the Rev. Mr. *Logier*, of *Lausanne* in *Switzerland*, the sum of 3000*l.* sterling to aforesaid annuities and legacies; and should the produce of the said sale not be found sufficient for that purpose, I desire that the remainder shall be made up from my personal property;" and he directed the remainder of his personal property "after the above annuities and all legacies have been paid and effected," to be laid out "in the purchase of an annual income in the 3*l.* per Cent. Consols," for the benefit of a Hospital: Held, *dissentiente* Lord Justice Lord Cranworth, that the annuities to *E. B.* and *E. F.* were perpetual annuities.

to hold the same independent of her husband, and to be disposed of by her will, properly signed and executed. I leave to her sister, *Jane Symes*, and the Rev. Mr. *Logier*, husband of the aforesaid *Frances Logier*, the sum of 1000*l.* each. I desire that my executors shall purchase annuities for each of my two sisters, viz. Mrs. *Eliza Byrne*, of *Thurles, Ireland*, and Mrs. *Ellen Fitzpatrick*, of *Killenall, Ireland*, of 100*l.* a year each, the said annuities to be purchased in the British funds. I leave 50*l.* a year to my niece Mrs. *Catherine Quinlan*, now living at *Lough* near *Thurles, Ireland*, to hold the same independent of her husband. I leave 25*l.* a year to each of my nieces *Ellen* and *Susan Laffan*, and also 25*l.* a year to *Joseph Laffan*, children of my late brother *John Laffan*. I leave to *Charlotte Cadogan*, Marchioness of *Anglesea*, 1000*l.* I leave to *Isabella Sheldon*, of *Brailshawe, England*, 100*l.* as a mark of my affectionate esteem. I leave to Dr. *Verity*, physician to the British Embassy, 100*l.* as a mark of my friendship. I direct my landed property at *Otham* to be sold by auction, and the produce to go to the carrying out of the aforesaid annuities and legacies; and should the produce of the said sale not be found sufficient for that purpose, I desire that the remainder shall be made up from my personal property. I direct all my personal property in the funds of the *East India* Company, the Bank of *England*, the Dutch Funds, the Neapolitan Funds, the French Funds, the French *Lyons* Railway shares, the Water Company of *New York*, the *Erie Canal* Company of *America*, to be sold. After the above annuities and all legacies have been paid and effected, I desire the remainder of my personal property shall be laid out in the purchase of an annual income in the 3*l.* per Cent. Consols for the benefit of a Cancer Ward in the *Middlesex* Hospital of *London*. I leave and bequeath 300*l.* to each of my executors, and I constitute and

1852.  
KERR  
v.  
THE  
MIDDLESEX  
HOSPITAL.

1852.  
 KERR  
 v.  
 THE  
 MIDDLESEX  
 HOSPITAL.

appoint the above said Earl of *Raufurly*, *Charles Kerr* and *Henry Houndle*, to be my executors and trustees—”

“The first codicil to my will, made and signed at *Vic* in *France*, and which is now in the hands of *Messrs Wise Wiler of Madrid*.—I leave and bequeath to my nephew, Captain *R. Laffan*, of the Royal Engineers, my interest and property in the *East India Funds* Stocks. I also leave to the same Captain *R. Laffan* aforesaid my estate and landed property in *Otham, Kent*. I leave and bequeath 50*l.* a year to Mrs. *Catherine Quinlan*, my niece. I leave and bequeath to *Joseph Laffan*, my nephew, 50*l.* a year over and above what I left him in my will.”


Mr. *Elmsley* and Mr. *F. Riddle*, for the Appellant.

The gift of the annuity being accompanied with a dedication of the estate which was to produce it (in the present case the landed property at *Otham* having been directed to be sold), the annuity is thus rendered perpetual, *Stokes v. Heron* (a); there is also an express additional provision out of the personal estate, if the produce of the sale of the real estate should be found insufficient; and it can make no difference on the construction of this gift, that by the codicil the *Otham* estate is subtracted from the purpose to which by the will it was devoted. Though there are no words of limitation in this gift, yet the absence of such words cannot derogate from the quantity of the gift, assuming that the dedication of a particular fund for the payment of an annuity will make it perpetual.

The direction for the investment of the residue for the purpose of buying “an annual income in the 3*l.* per Cent. Consols”

(a) 12 *Cl. & Fin.* 161.

**Consols**" for the hospital shows that the annuity there intended is clearly perpetual, and the direction to purchase an annuity in the British funds can receive no other construction.

1852.  
  
**KERR**  
 v.  
**THE**  
**MIDDLESEX**  
**HOSPITAL.**

**Mr. Roupell** and **Mr. Cairns**, *contra*.

**T**here is a marked distinction between the cases where the subject of the gift is an annuity *simpliciter*, and where the subject of the gift is the property itself which yields the annuity. It is clearly established that in the former case the annuitant only takes for life. The mere fact that an annuity is directed to be paid out of a particular fund will not render it perpetual, for it is to be presumed that some property of the testator exists for the purpose of satisfying such annuity: thus in the case of *Wilson v. Maddison* (a), the annuity was from the interest of the testator's funded property in the Bank of England, and it was held only to be a charge on that property for the life of the legatee. So in *Innes v. Mitchell* (b), the annuity was "to be paid out of my general effects" and was restricted to a life annuity. Where, however, the dividends which are the fruit of the fund destined to secure an annuity are absolutely given, then of course the annuity is perpetual, as in *Rawlings v. Jennings* (c), *Stretch v. Watkins* (d), *Clough v. Wynne* (e). The case of *Stokes v. Heron* (f) is distinguishable from the present, as in that case the gift was of the subject-matter which was to purchase the annuity; on the face of this will, however, it is not property which is given, but simply an annuity, which, according to its technical meaning, is for life only.

The words in the residuary gift, "paid and effected,"  
 are

(a) 2 Y. & C. C. C. 372.

(b) 6 Ves. 464.

(c) 13 Ves. 39.

(d) 1 Mad. 253.

(e) 2 Mad. 188.

(f) 12 Cl. & Fin. 161.

1852.  
 KERR  
 v.  
 THE  
 MIDDLESEX  
 HOSPITAL.

are words of art, and more applicable to the purchase of a government life annuity than to the purchase of consols; it is also a circumstance not to be overlooked, that whenever the testator desires to give gross sums he has used unequivocal expressions for the purpose.

Mr. *Lloyd* and Mr. *Busk*, for the trustees.

Mr. *Elmsley*, in reply.

*The LORD JUSTICE LORD CRANWORTH.*

In this case I do not concur with the Lord Chancellor and Lord Justice *Knight Bruce*, and it is arranged between us that I, as the junior Judge, should state my reasons first.

The question is, whether or not a certain annuity given by the will of this testator is given to the annuitant for life, or whether she is entitled absolutely to the fund which produces the annuity. The Master of the Rolls has decided that she is entitled to a life annuity only. The Appellant contends that it is a gift of the corpus of the fund in perpetuity. How would the case have stood if there had been no direction to purchase in the British funds, as if the testator had said, "I desire that an annuity should be purchased of 100*l.*"? I should have thought that in such a case the annuity would be for the life of the annuitant only. This I thought was settled by Lord *Cottenham* in the case of *Blewitt v. Roberts* (a). The general rule there laid down is, that the gift of an annuity *simpliciter* is for life only. That being so, is the case altered by what follows, "the said annuity to be purchased in the British funds"? That direction does not appear to me to alter the case. It appears

to

(a) *Cr. & Ph.* 274.

to **me** that the direction might be satisfied by the purchase of a government annuity, which is authorized by the **Act** of Parliament. It is true that the Act regulating the purchase of life annuities does not charge them upon any of the funds, ordinarily so called, but charges them upon the consolidated fund of the country. But **I** think that in construing a will like this, we must understand the testator to have used the expression, "British funds," in the popular sense of "British securities," and to have meant that the legatee should have her annuity of 100*l.* secured to her by the British government, as contradistinguished from any of the other funds in which, it seems, he had property—such as the Dutch or Neapolitan funds. Still, although this is the interpretation which I should have put upon this will, independently of authority, I should at once have yielded that opinion, if I had thought that it was adverse to decided cases, and more particularly if it was adverse to the case which has been so much commented upon, and which was heard by the present Lord Chancellor when he held the office of Lord Chancellor of Ireland, and was afterwards, for all material purposes, at least as far as the present question is concerned, confirmed by the judgment of the House of Lords. I do not, however, consider that authority as one governing the present case. In *Stokes v. Heron* (a), the authority to which I am referring, the language of the will appears to me to have been materially different from that of the will now before us. The bequest was thus expressed: "My will is, that whatever I die possessed of or in any way entitled to, together with whatever property my wife may be in any way entitled to, shall produce to my wife an annuity of 100*l. per annum*,—to each of my daughters 100*l. per annum*, for themselves and their children."

Now

(a) 12 *Cl. & Fin.* 161.

1852.  
  
 KERR  
 v.  
 THE  
 MIDDLESEX  
 HOSPITAL.



1852.  
 KERR  
 v.  
 THE  
 MIDDLESEX  
 HOSPITAL.

Now with reference to the annuity of the wife, ~~what~~ my Lord Chancellor of Ireland decided, and the House of Lords held that he rightly decided, was this, that the legacy given to the wife was such an amount of property as produced 100*l.* a year. That decision, I conceive, depends upon the particular language which I have read. I do not say whether I should have put the same construction upon that language, independently of that authority. I rather think that I should. But it is unnecessary for me to say anything on that point, for I yield to that authority, even if the construction was not that which I should have adopted. But the direction in the present case is to purchase an annuity, which would be only a gift of an annuity, according to the case before Lord *Hardwicke*, of *Savery v. Dyer* (a).

The view which I have taken of the case is somewhat confirmed, to my mind, by the residuary gift. The residuary gift is to the *Middlesex* Hospital, and is thus expressed: "I desire the remainder of my personal property shall be laid out in the purchase of an annual income of the 3*l.* per Cent. Consols," not saying there "in the British funds," but pointing to a perpetual fund. It seems to me that this circumstance, which of itself would have been of very little weight, somewhat tends to confirm the view that I have taken.

*The* LORD JUSTICE KNIGHT BRUCE.

I am not sure that I differ from the Master of the Rolls or from Lord *Cranworth* in the view which either of those learned Judges has taken of this cause, excepting in a single point, namely, the applicability to it the case of *Heron v. Stokes* as an authority, and I particularly wish to guard myself from being understood as intimating how I should have been disposed to deal with

the

(a) *Amb.* 139.

the present cause if that of *Heron v. Stokes* had not existed. *Heron v. Stokes*, so far as material in this instance, had the concurrence of the then Lord Chancellor of *Ireland* and the House of Lords; and it was held by both, (we must assume the opinion of the House of Lords to have been so, because it seems to have been thus expressed by every noble and learned Lord who spoke in the House upon the subject)—that the wife of the testator, as she was held to take a perpetual annuity under the will and codicil, would have taken a perpetual annuity under the will alone, independently of the codicil. I find myself unable to say, if that conclusion was right, as it must be taken to have been, that this lady does not also take absolutely a perpetual annuity; and therefore, upon the authority of *Heron v. Stokes* repeating that, I do not mean to intimate what I should have held if that case had not existed), I feel bound to say that this lady does take a perpetual annuity.

1852.  
  
 KERR  
 v.  
 THE  
 MIDDLESEX  
 HOSPITAL.

*The LORD CHANCELLOR.*

This case turns upon the true construction of this testator's will, and the question upon it is to be governed by the rules of law; those rules I apprehend admit of no doubt. It is perfectly settled that if an annuity be given *simpliciter*, that is, to one generally, a life interest only passes. It is equally, I believe, undisputed, that if an annuity be directed to be provided out of the proceeds of property, or out of property generally, if an annuity is to be brought into existence by the application of property, and that annuity is given to a party generally, he will take the property appropriated to purchase the annuity, and therefore the annuity in perpetuity, if purchased. In the case of *Heron v. Stokes (a)*, it was much more difficult to construe the gift as a perpetual annuity.

There

(a) 2 *Dru. & War.* 89; *S. C.* on appeal 12 *Cl. & Fin.* 161.

1852.  
 KERR  
 v.  
 THE  
 MIDDLESEX  
 HOSPITAL.

There the testator says : " My will is, that whatever I die possessed of or in any way entitled to, together with whatever property my wife may be in any way entitled to, shall produce to my wife an annuity of 100*l.* per annum—to each of my daughters 100*l.* per annum, for themselves and their children"—Might not that mean one of two things, either that the executors should set apart so much of the property as would produce 100*l.* a year, or that they should purchase the annuity out of the proceeds? Property just to the amount that would produce 100*l.* a year could not well be set apart, but so much money as would purchase the exact sum of 100*l.* a year might easily be raised. The more probable and rational construction therefore was, as I thought, that the words of that will were sufficient to create a perpetual annuity, and I suppose upon the same ground (for no other was mentioned) the House of Lords arrived at a similar conclusion.

If upon this will I find an intention expressed, not simply to give an annuity to the Appellant in mere words of donation, but that an annuity is to be purchased for her, and that purchase is to be made out of the *corpus* of the testator's property, then I apprehend it is an annuity which is to exist in the way in which it is to be purchased, namely, generally and perpetually; whatever sum therefore it would cost to produce the annuity must be invested for that purpose, or the annuitant may elect to take such principal sum.

I wish it to be understood, that we are expressing no opinion against the decision of the Master of the Rolls upon the other annuities in this will, which may, very probably, be considered to stand upon different grounds. Our attention has been directed, as it ought to have been, only to the particular case of the Appellant, which has been

selected manifestly from the whole list as a favour-case to bring by way of appeal to this Court.

1852.

KEBB

v.

THE  
MIDDLESEX  
HOSPITAL.

The testator it is true has not added words of limitation to the bequest of the particular annuity, but he nowhere in the course of his will adds to any of his gifts words of limitation, and it is only with reference to a married woman, where he gives her 3000*l.*, “to hold the same independent of her husband, and to be disposed of by will, properly signed and executed,” that he seems to make an absolute gift; for even in the devise of his real property to be sold, he uses no words of inheritance.

In the bequest to the Hospital he says, “I desire the remainder of my personal property shall be laid out in the purchase of an annual income in the 3*l.* per Cent. bonds for the benefit of a Cancer Ward,” using no words of perpetuity; in fact, in no one instance does he use words of limitation or perpetuity in favour of a legatee. The recent statute for the amendment of the laws with respect to wills (*a*), no doubt, when a testator gives a bequest, the legatee takes it absolutely, just as if the testator had before that statute given a chattel, unless the gift is restrained by the context; and that authority of Parliament in giving effect to what was the general opinion of mankind, ought to have an influence in cases of this kind, where the will is fairly open to the construction that the absolute interest was intended to pass.

Having given certain other legacies, the testator proceeds: “I desire that my executors shall purchase annuities for each of my two sisters, viz. Mrs. *Eliza Byrne*, of *County Wick, Ireland*, and Mrs. *Ellen Fitzpatrick*, of *Killenall, County Wick*, of 100*l.* a year each, the said annuities to be purchased in the British funds.” It is to be observed that he does not stop there, for in the subsequent part of the

(*a*) 1 *Vict.* c. 26.

1852.  
 KERR  
 v.  
 THE  
 MIDDLESEX  
 HOSPITAL.

the will, after having given other legacies and annuities, he says : “ I direct my landed property at *Otham* to be sold by auction, and the produce thereof to go to the carrying out of the aforesaid annuities and legacies.” How is “ the produce ” to go to the carrying out of the aforesaid annuities and legacies ? The landed property is not dedicated out of the annual proceeds to pay the annuities and the legacies, but the landed property without words of inheritance is to be sold, and the produce is “ to go to the carrying out of the aforesaid annuities and legacies.” What is meant by “ carrying out the aforesaid annuities and legacies ? ” The testator did not mean that there was to be a continued payment of the annuities out of the rents or the produce of the property, but it was his intention that a certain portion of the proceeds of that property should be applied to the purchase of the annuities in the British funds and to the payment of the legacies, for he adds, “ and should the produce of the same be not found sufficient for that purpose ”—that is, for the purpose of producing the annuities and the legacies—“ I desire that the remainder ”—that is, the money wanted—“ shall be made up from my personal property.” He then directs all his personal property, which he specifies, to be sold, and converted into money, and concludes, “ After the above annuities and all legacies have been paid and effected, I desire the remainder of my personal property shall be laid out in the purchase of an annual income in the 3l. per Cent. Consols for the benefit of a Cancer Ward in the *Middlesex* Hospital.” The effect of that provision is, that should the real estate fall short of being sufficient to pay and effect the annuities and legacies, that is, to purchase the annuities and pay the legacies, then he resorts to his personal estate ; and in that case so much is to be taken from the personal property as will effect the annuities and pay the legacies. The words are not exactly accurate in their position, but the sense

is

is manifest, and it is quite immaterial in what order the words come in such a sentence. Then follow the words, "I desire the remainder of my personal property shall be laid out in the purchase of an annual income." Has the testator not thus expressed, as clearly as could be expressed, an intention that these annuities and legacies shall be all separated from the *corpus* of his property, and that what remains after paying the legacies and effecting the annuities shall be money in hand to invest in consols? Without entering into the consideration of the question as to the purchase being to be made in the British funds, this is a case in which the testator has given an annuity to be purchased out of the produce of his estate, and the rest of his estate is to be applied to another object; therefore so much of the produce of his estate is in this view altogether cut off from the rest of the property, and dedicated to the particular purpose. We have not now to consider what might be the effect in law of particular annuities falling into the residue. If, however, an annuity be provided for a particular person generally by investment of a portion of a testator's estate, I hold it to be clear law that the annuitant will take the absolute interest, because it is in effect a dedication of a portion of the *corpus* of the testator's property to produce the particular annuity.

Looking at the general import of this will, I do not at all feel the difficulty which arises or is supposed to arise upon the direction that the annuities are to be purchased in the British funds. It is in the first place to be observed, that here there is not a simple gift of an annuity, but it is a gift by way of direction to purchase the annuity, not a word being said about the annuity being for life. What improbability is there, that in the ordinary case where an annuity is directed to be purchased with the proceeds of a testator's property, the annuitant is to take the annuity as purchased? And

1852.

KERR

v.

THE  
MIDDLESEX  
HOSPITAL.

1852.  
 KERR  
 v.  
 THE  
 MIDDLESEX  
 HOSPITAL.

And surely it is not to be supposed, because the testator adds his desire that the annuity should be purchased in the British funds, that such an expression means that a government life annuity is to be purchased.

I must find something specific on the face of this will to compel the Court to say that a direction to buy an annuity in the British funds means to buy a government life annuity under particular Acts of Parliament. Those Acts of Parliament are fenced around with all sorts of difficulties, and I cannot in the face of such difficulties impute to this testator any such intention; if he had such intention, nothing would have been more easy than for him to have said, "buy for her life," and then in all probability he would have added, "in the government funds." What is the meaning of the expression "British funds"? What is the nature of a government annuity? The Commissioners for the Reduction of the National Debt are authorized to take stock or money from persons willing to treat with them for the purchase of a government life annuity, and if money is taken, that is to be converted into British stock. The stock when obtained goes in satisfaction of the National Debt, and then the purchaser is to have an annuity secured upon the Consolidated Fund. By the express direction of the Act of Parliament, British funds may be exchanged for such an annuity, but it cannot therefore be predicated that the annuity is payable out of British funds, in the sense used by this testator. The expression, "British funds," does not mean British money: it means the public funds of this country; and as the testator had got funded property in other countries, he says "British funds," and not foreign; but the word "funds," in common parlance, and according to its natural import, means the funds of *England*, the British funds. If, however, a man buys a life annuity of the government, he

does not buy an annuity in the British funds, but an annuity payable out of the Consolidated Fund. Now the Consolidated Fund is money raised by the authority of Parliament to pay the British funds themselves. The British funds are nothing but perpetual annuities renewable; and the very money out of which this annuity, had it been purchased, would have been payable, would have been, not out of the British funds, the property of the public individually, but out of the accumulation of the consolidated fund applicable to the payment of the national engagements. The two things are so nearly contradistinguished from each other, that I do not consider this testator, by any latitude of language, intending, by the direction to purchase an annuity in the British funds," an equivalent expression to the purchase of a government life annuity. It is also to be observed, that in the residuary bequest to the Hospital, the testator does not direct the purchase of an annual income for the Hospital in the British funds, but he designates the investment as the 3*l.* per Cent. Consols. When, however, he wanted to produce a particular annuity, he says, "buy that annuity in the British funds." To him it is indifferent whether it was bought in the 3*l.*, 4*l.*, 5*l.* per Cents, because when bought it was to be a perpetual annuity, and the *corpus* which was to produce it would become the absolute property of the testator.

I cannot qualify the expression of my opinion, because I do not strongly entertain it, but I need not say that I have made these observations with the most unfeigned respect and deference for the opinion entertained by

Lord Justice Lord *Cranworth*, and the doubt expressed by my Lord Justice *Knight Bruce*. If the appellant's case had alone been brought before the Master of the Rolls, I think it very likely he would have

1852.

KERR

v.

THE  
MIDDLESEX  
HOSPITAL.



1852.  
 KERR  
 v.  
 THE  
 MIDDLESEX  
 HOSPITAL.

have adopted the construction arrived at by this Court ; I desire it, however, to be distinctly understood that the decision of this Court in no respect affects the decision of the Master of the Rolls, except in the case of the particular annuity the subject of this appeal.

The costs of the appeal of all parties will come out of the residue, because it is a question raised by the testator.

---

The following is the order which was drawn up.

“ Their Lordships do order that the order on further directions made in these causes by his Honor the Master of the Rolls, dated the 12th day of *June* 1852, be varied so far as it declares that, according to the true construction of the will of Sir *Joseph De Courcy Laffen*, Baronet, deceased, the testator in the pleadings of these causes named, the annuity thereby bequeathed to the Petitioner *Eliza Byrne* was determinable upon the death of the annuitant. And their Lordships do declare that the same was and is a perpetual annuity. And their Lordships do declare that the sum of 3333*l.* 6*s.* 8*d.* Bank 3*l.* per Cent. Annuities by the said order directed to be carried over to an account to be entitled ‘The Life Annuity Account of the Defendant *Eliza Byrne*,’ ought to be dealt with accordingly. And it is ordered that the costs of all parties of this appeal as between solicitor and client be borne by the residuary personal estate of the said testator, and be accordingly taxed and paid and included in the costs of these suits which are by the said order of the 12th day of *June* 1852 directed to be taxed and paid. And it is ordered that the sum of 20*l.* deposited with the registrar on setting down the said petition of appeal be returned to the Petitioner  
*Eliza*

e, or to Mr. *Edward Norris*, her solicitor.  
the parties are to be at liberty to apply to  
the Master of the Rolls as they may be

1852.  
KERR  
v.  
THE  
MIDDLESEX  
HOSPITAL.

uence of the above declaration, and in pur-  
e liberty reserved in the order, *Eliza Byrne*  
the 15th *March* 1853, to the Master of the  
payment out to her of the sum which had  
l over to the life annuity account in her  
upon that occasion his Honor granted the

---

9th *March* 1853 the Defendant and an-  
n *Fitzpatrick*, who had not appealed, but  
to whom was identical with that to *Eliza*  
ented a petition to the Master of the Rolls  
nent to her notwithstanding the decree, of  
l moneys which had been carried over to the  
account in her name.

y and Mr. *Thring* appeared in support of

er of the Rolls made the order.

1852.

Dec. 18.

COX v. DOLMAN\*.

Before *The*  
*Lord Chan-*  
*cellor* LORD  
ST. LEON-  
ARDS, and *The*  
*Lords Jus-*  
*tices.*

A testator devised his real estates to trustees, upon trust to pay certain annuities, which were to be increased in certain events, and a term of ninety-nine years was vested in other trustees, for better securing the annuities, and, subject thereto, the estates were limited to the testator's sons for life,

with divers remainders over. The first tenant for life entered into possession, and soon afterwards the events happened by which the annuities were to be increased; the original annuities were regularly paid, but no payment was made in respect of the increased annuities; after the death of the tenant for life, and much more than six years after the period when such increased payments ought to have been made, a bill was filed by one of the annuitants to have the whole arrears raised out of the estate of the tenant for life, and by sale or mortgage of the term: *Held*, that the term being a subsisting term, on which the trustees might obtain possession, the case was within the saving of the 25th section of the Act 3 & 4 Will. IV. c. 27, and that the annuitant was not barred by the operation of the 42nd section of that Act from recovering the entire arrears.

The abstract question determined in *Hunter v. Nockolds*, 1 Mac. & G. 641, is unaffected by this decision, though in that case, as in this, the annuity was collaterally secured by a term of years, a circumstance which was not adverted to either in the argument or judgment.

**R**OBERT KILBY COX by his will, dated the 17<sup>th</sup> May 1820, devised and bequeathed all his freehold, copyhold, and leasehold estates unto *John Webbe Weston* and *John Wright*, their heirs, executors, administrators and assigns, according to the respective nature and tenure thereof, to the use and intent that his son *Robert Kilby Cox*, and his the said testator's daughters *Alicia Mary Cox* and the Plaintiff *Mary Ann Cox* and their respective assigns, should and might respectively have, receive, and take out of the rents, issues, and profits of the said estates one clear yearly rent-charge of 200*l.* each, during their joint natural lives; and that upon the decease of any one of them, the two survivors of them and their respective assigns might have, receive, and take thereout one clear yearly rent-charge of 300*l.* each, during

\* This cause was heard by special leave before the Lord Chancellor and the Lords Justices in the first instance, as the Master of the Rolls, before whom it was originally brought, felt himself embarrassed by the decisions of Lord *Lyndhurst* and Lord *Cotterham*, in the cases of *Young v. Lord Waterpark*, 15 *Law J. (N. S.)*, Ch. 63, and *Hunter v. Nockolds*, 1 Mac. & G. 640.

ing their joint natural lives; and after the decease of  
 r of them, then that the ultimate survivor of them,  
 his or her assigns, might have, receive, and take  
 out one clear yearly rent-charge of 400*l.* during  
 or her natural life; and the testator thereby gave  
 is said son and daughters, and their respective  
 ns, such and the same powers of distress and entry  
 nforcing the due payment of the said rent-charges  
 ectively, as were usual in cases of non-payment of  
 reserved on common demises; and subject thereto,  
 he use of *John Webbe Weston* and *James Cugnoni*,  
 r executors, administrators and assigns, for the term  
 9 years, upon trust for better securing the due pay-  
 at of the said rent-charges respectively; and from  
 after the end and expiration, or other sooner de-  
 mination of the said term of 99 years, and in the  
 ntime subject thereto and to the trusts thereof, to  
 use of his the testator's eldest son *Samuel Cox* for  
 and from and after his decease to such successive  
 for life and in tail as were therein particularly men-  
 ed, but which failed to take effect in the lifetime of  
 or; and after and subject to such uses, to the third  
 every other son of the testator's nephew as should  
 orn in his lifetime, for life, with remainder to their  
 and other sons respectively in tail; and he  
 inted his sons *Samuel Cox* and *Robert Kilby Cox*  
 utors of his will. By a codicil dated the 23rd  
 ber 1827, the testator substituted other trustees  
 he place of those named in the will of the devised  
 es, and of the term of 99 years; and he thereby  
 to each of his daughters, *Alicia Mary Cox* and  
 y *Ann Cox*, one further annual sum or yearly rent-  
 ge of 100*l.*, to be issuing out of and charged and  
 geable upon all and every his freehold, copyhold,  
 leasehold estates, to be raised by the trustees of the  
 of 99 years; and he thereby declared that his

1852.  
 Cox  
 v.  
 DOLMAN.

1852.  
 Cox  
 v.  
 DOLMAN.

daughters and trustees should have the same powers and remedies for recovering and compelling payment thereof respectively, as in his will were mentioned and expressed respecting the rent-charges of 200*l.* thereby respectively given to his said daughters; and after the decease of either of them the testator thereby gave to the survivor of them and her assigns for her life, the additional annuity of 100*l.*, thereby given to such one of his daughters as should first depart this life, with the same powers and authorities as were thereinbefore given for the recovery thereof, and to be secured to them as the other annuities were secured. And the testator thereby declared that the annuities so thereby given for his said daughters as aforesaid, should be over and above and besides all other annuities or bequest given to them respectively by the will; and he thereby appointed *Alicia Mary Cox* to be his executrix jointly with his two sons *Samuel Cox* and *Robert Kilby Cox*.

The testator died on the 1st *February* 1829, and his son *Samuel Cox* entered into possession of the estate. *Robert Kilby Cox* the son died without issue on the 4th *February* 1833, and *A. M. Cox* the daughter on the 30th *September* 1838. *Samuel Cox* died on the 18th *April* 1851, whereupon *R. Snead Cox*, the third son of the testator's nephew, became tenant for life, and entered into possession of the estates. From the period of the death of *R. K. Cox* down to the death of *S. Cox*, the Plaintiff *Mary Ann Cox* had only received the annual rent-charge of 300*l.*; no payment in respect of the increased annuities to which the plaintiff became entitled under the codicil, after the deaths of *R. K. Cox* and *A. M. Cox*, was ever made. The bill, which was filed on the 2nd *July* 1852, stated that the Plaintiff was in total ignorance of her rights until after the death of *S. Cox* and

and now sought to charge the whole of such arrears, from the respective deaths of *R. K. Cox* and *A. M. Cox* in 1833 and 1838, on the assets of *S. Cox*, and out of the accruing and future rents and profits, and to raise the same by sale or mortgage of the term.

1852.  
Cox  
v.  
DOLMAN.

The Defendants, the executors of *S. Cox*, by their answer submitted that the claim of the Plaintiff ought to be barred by the recovery of the arrears during six years next before the filing of the bill, and they claimed the benefit of the Statute of Limitations, 3 & 4 Will. IV. c. 27.

For *R. Palmer* and Mr. *A. Cooke*, for the Plaintiff.

The authority of *Young v. Lord Waterpark* (a), decided by Sir *L. Shadwell*, and affirmed by Lord *Lyndhurst*, is directly in favour of the claim. It may be said that that case was decided on the 40th section of the Act 3 & 4 Will. IV. c. 27, but there is no distinction in principle between the 40th and the 42nd sections of that Act. The result of the authority of *Young v. Lord Waterpark* is, that where there is a trust, whether for raising portions under the 40th section, or annuities under the 42nd (the word "rent" including annuities by the interpretation clause), such a case will fall directly within the object and operation of the 25th section (b). No question would have arisen here except for the decision in *Hunter v. Nockolds* (c); but the judgment of Lord *Cottenham* in that case did not touch the point now raised, and there the question, as argued, turned not upon the fact that a trust term was subsisting which would have brought the case within the saving of the 25th section of the 3 & 4 Will. IV. c. 27, but upon the effect to be given to the personal covenant of the grantor of the annuity under the

(a) 13 Sim. 204; S. C. on appeal, 15 Law. J., Chanc. N. S., 63.

(b) *Sugden's Real Property Statutes*, pp. 104, 105.

(c) 1 Mac. & G. 640.

1852.  
 Cox  
 v.  
 DOLMAN.

the 42nd section of that statute, taken together with the 3rd section of the subsequent Act, 3 & 4 Will. IV. c. 42. Lord Cottenham, in that case, only reversed Sir J. Wigram's decision, so far as it was based upon the previous authority of the same Judge in *Du Vigier v. Lee* (a) to the effect that under those two statutes taken together, twenty years' arrears might be recovered; and it is to be observed that the case of *Young v. Lord Waterpark* (b) was not cited.

[The LORD CHANCELLOR.—I do not think the authority of *Hunter v. Nockolds* can be quoted against that of *Young v. Lord Waterpark*.]

Mr. Campbell and Mr. Bagshawe, jun., for the executors of S. Cox, *contra*.

On the true construction of the 42nd section, no more than six years' arrears of the annuity are recoverable. Where by the law as it stood before the Act 3 & 4 Will. IV. c. 27, there was a legal bar, Courts of equity considered that equitable rights ought to be bound by the same limitations; by the 24th section, however, of that Act, there is an express statutory provision applying a similar bar to suits in equity. The first 23 sections apply to legal estates, and the 24th would have clearly embraced the present case but for the 25th section, which excepts the case of express trusts; but that, in effect, only revives the old law, and was intended to be confined to questions between *cestuis que trust* and trustees in possession.

[LORD JUSTICE KNIGHT BRUCE.—According to your argument, the trustees, if they should obtain possession, would be trustees for part only of the annuities and not for the whole.]

[The

(a) 2 Hare, 326.

(b) 13 Sim. 204; S. C. on appeal, 15 L. J. Chanc. N. S., 63.

LORD CHANCELLOR.—If you can show that the years is barred, then you can protect yourself; admitted that the term is valid and subsisting, trustees therefore may bring ejectment.]

1852.  
Cox  
v.  
DOLMAN.

JUSTICE LORD CRANWORTH.—On what trusts the trustees hold if in possession?]

could only recover six years' arrears under the section. The question in *Young v. Lord Waterpark* was not identical with the present; it arose under section, whereas the present arises under the *now v. Bagwell (b)*: in the former case the question, whether the whole sum was recoverable, and whether the rents beyond six years, contrary to the provision of the 42nd section: in the former there had been part payment.

LORD CHANCELLOR.—So there has been here.]

proper and Mr. Witham, for R. Snead Cox, the life in possession.

my, for the trustees of the term.

ut calling for a reply,

LORD CHANCELLOR.

point is clearly settled on the authority of *Young Waterpark (a)*, and on principle there is no difference between that case and the present. The legal estate remains undisturbed, and the parties who have the estate may at once recover possession; as long as the right remains in them, the claim which is asserted by

m. 204; S. C. on appeal, 15 L. J. Chanc. N. S., 63.

(b) 4 Dru. & War. 398; see p. 409.



1852.  
 Cox  
 v.  
 DOLMAN.

by the Plaintiff is not barred by the statute. Whenever the trustees, having the right, execute the trust by taking possession, the right of the *cestui que trust* immediately accrues, and she is entitled to the full benefit of the trust. Here the only question is, whether there can be an independent bar to prevent these trustees from raising the arrears when it is admitted that there is an undisputed trust. There is another circumstance which is not to be overlooked, viz. that the greater part of these annuities have all along been paid, and have only not been paid in full, through the neglect of the trustees, who have failed to execute their trust to the full extent; moreover there can be no doubt but that the person in possession of the estates was aware of and held them subject to the trust. There is no ground whatever to impeach the decision in *Young v. Lord Waterpark* (a). The report of that case, however, does not distinctly show that there was a subsisting term on which the trustees could have recovered. As that is admitted, all difficulty as to the propriety of the decision vanishes.

There must be a declaration that the Plaintiff is entitled to the whole of the arrears claimed by the bill, to be paid out of the assets of the tenant for life up to the day of his death, and since his death by the present tenant for life.

The LORDS JUSTICES concurred.

(a) 13 *Sim.* 204; *S. C.* on appeal, 15 *L. J. Chanc. N. S.*, 63.

1852.

1851.

Feb. 12, & 13.

Nov. 15.

1852.

Dec. 1.

MYERS v. PERIGAL.

**THE** appeal in this case was originally brought before Lord *Truro*, on the 12th *February* 1851, by the Defendants, who are the representatives of four charitable societies, from so much of a decree of the Vice-Chancellor *Shadwell* as declared that the bequest of certain shares in the *Durham* and *Northumberland* District Bank was not a legal bequest within the Statute of Mortmain. The case before the Vice-Chancellor is reported in the 16th vol. of Mr. *Simons*' Reports, p. 533.

The appeal was fully argued before Lord *Truro* on the 13th and 14th of *February* 1851, and on the 15th *November* 1851 the case was placed in his Lordship's paper for judgment. On that occasion he made the following observations:—I have considered this case, and am now prepared to give my judgment upon it; but as so much property has of late become invested in Joint-Stock Companies, and as the question before me is one which has already often arisen and led to conflicting decisions, and is likely frequently to recur, it is extremely important to put the question in a course for a final decision by having the opinion of a Court of law on its construction.

The cases bearing upon the point seem to divide themselves into three classes; first, those of Companies which are corporations, but corporations of the peculiar nature

that upon the distinction in

effect between a provision by deed or statute constituting a joint-stock company, whereby its assets are to be deemed personal estate; and *semble per eundem*, that there is nothing in the Statute of Mortmain, from which it is to be inferred that partnerships, consisting of numerous individuals and possessing real estate, are to be exempt from its operation.

Before *The Lord Chancellor* LORD ST. LEONARDS.

Bequest of shares in a joint-stock bank, the assets of which were by its deed to be deemed personal estate, and which consisted of freehold and copyhold estates and money due upon mortgage of freehold, copyhold, and leasehold hereditaments, held not to be within the Statute of Mortmain.

Observations of Lord *Truro* upon joint-stock companies established by charter, statute, and deed, and

1852.  
 MYERS  
 v.  
 PERIGAL.

that each individual is entitled to a certain proportionate part of the profits resulting from the corporate property : with regard to these, there have been decisions that the shares in the corporate property are not within the Mortmain Act. I may mention as an example the case of *Bligh v. Brent* (a), which related to the *Chelsea Water Works*, where it was held that the shares in that Company were personalty and passed under the old law by an unattested will ; they were not considered as an interest in land within the Mortmain Act, because it appeared that the language of the charter of incorporation was much more suitable to personal than to real estate ; and the Court held that the interest of the corporation was an interest only in the surplus profits, and that the land was merely the instrument whereby the joint stock money was made to produce profits. There is certainly a distinction between such corporations and ordinary corporations, in so far as that, generally speaking, members of a corporation have no specific share or interest in the profits of the corporate property, and cannot assign their interest in the corporate property ; but in corporations of the former sort each corporator has a separate and distinct assignable interest to the extent of his shares. The question, however, as to the interest of such a corporator is quite distinct from that which comes under consideration in this case.

A second class is that of Joint-Stock Companies established by deed, but not incorporated either by charter or Act of Parliament, and the only distinction between such Companies and Companies established by Act of Parliament is, that in the latter case the agreement or contract of partnership takes the form of law under the authority of the Legislature. I particularly refer to those Acts of Parliament

(a) 2 Y. & C. 268.

1852.  
 MYERS  
 v.  
 PERIGAL.

Parliament which establish Joint-Stock Companies, and which contain a clause that the interests of the shareholders shall be deemed personal estate. When that clause is embodied in an Act of Parliament, of course its enactments are legally binding, whatever may be their effect, but when the same clause is contained in a deed of partnership it may not have the same effect at all, because parties cannot agree among themselves to alter the legal character of incidents attached to a certain description of property; and this appears to be the only distinction between Companies constituted by deed, and Companies constituted by Act of Parliament.

The third class comprise Joint-Stock Companies established by Act of Parliament, but as the present is not one of those cases we need not further consider what is the effect of a Joint-Stock Company so established. The present is a Joint-Stock Company established by deed, not otherwise connected with statute law, except under the general Act for regulating Banking Companies, and appearing in respects quite irrelevant to the question now before me.

In the decision to which I have referred, the peculiar nature of this property being the subscriptions of numerous individuals, was remarked upon, and had some share in influencing the conclusion that was come to; but I have been unable to discover what those peculiar incidents are which have any bearing on the question. Is there any difference, in its legal characteristics, between a partnership of a hundred or a thousand, and a partnership of two or three? I am not aware that the law varies according to the number of members of a partnership. What then is the difference between a Joint-Stock Company established by deed and an ordinary partnership?

It

1852.  
 MYERS  
 v.  
 PERIGAL.

It was said that the Legislature, at the time of passing the Mortmain Act, could not have contemplated this description of property. Why not? It might not have contemplated these large partnerships; but the law applicable to partnerships was understood, and if there had been anything in the nature of a partnership, that ought to have had any influence in the determination of its character, I think it would have been noticed. If I am correct in my impression, the present is an ordinary partnership with all its legal incidents, though attended with some difficulties of arrangement arising from the numbers of which it is composed; and it appears to me that there is nothing in the Statute of Mortmain, from which it is to be inferred that that statute has no application to cases like the present. I would further remark, that, generally speaking, the decisions upon an Act of Parliament which are the most proximate to the period of its becoming law are most likely to correspond with the spirit and intention of the Act. Within seven years after the passing of the Mortmain Act, the case of *The Attorney-General v. Lord Weymouth* (a) was decided. There a testator had directed his estates to be sold, and out of the proceeds of the estates, certain sums to be given to charities. A question arose, whether that devise was within the Mortmain Act. I think the judgment of the Lord Chancellor Lord Hardwicke is very important, and bears strongly on the present case. He there remarks: "It is insisted that the true intention of the Act was, according to its title, to restrain the disposition of lands, whereby they became inalienable, and this was the only intention of the Act. But I think the intent of the Act is taken up much too short, for the title is no part of the Act, and has often been determined not to be so; nor ought it to be taken into consideration in the construction of this Act, for originally there

(a) *Amb.* 20; see p. 22.

1852.

MYERS  
v.  
PERIGAL.

re were no titles to the Acts, but only a petition and King's answer, and the Judges thereupon drew up Act into form, and then added the title; and the does not pass the same forms as the rest of the Act, by the Speaker, after the Act is passed, mentions the, and puts the question upon it; therefore the meaning of this Act is not to be inferred from the title, but must consider the Act itself. It first takes notice, that gifts and alienations of lands in mortmain are prohibited by divers wholesome laws, as prejudicial to the common utility; and then it proceeds, that nevertheless this public mischief has greatly increased by many large and improvident alienations or dispositions, made by languishing or dying persons, or by other persons to uses called (charitable) to take place after their deaths, to the disherison of their lawful heirs. The reason of this statute was to hinder gifts by dying persons, out of a pretended or mistaken notion of religion, as thinking it might be for the benefit of their souls to give their lands to charities which they paid no regard to in their lifetime; and therefore the Act of Parliament has not absolutely prohibited the disposition of land to charitable uses, but left it to be done by deed, executed a year before the death of the grantor, and enrolled within six months after execution, though this will render them actually unalienable; but the Legislature blended the two inconveniences together, the acts of languishing and dying persons, and the disherison of heirs."

I may here observe, that it will be found by referring to Magna Charta, and to 7 *Edw. I.* st. 2, c. 1, that there had been a constant conflict between the Legislature and religious bodies, the Legislature trying to prevent alienation under the influence of impressions that are more cogent when a man is about to leave the world than during the vigour of his life, and the aim of the statute

1852.  
 MYERS  
 v.  
 PERIGAL.

statute being to prevent the disherison of heirs under such circumstances, and constant attempts being made by religious bodies to evade its operation. That may account for the generality of the words in the preamble to the 9 Geo. II. c. 36, which appears framed expressly to prevent evasion. It will oftentimes happen, from the imperfection of language, that it cannot be adapted to repress a general evil effectually without its sometimes embracing cases beyond which the evil exists. Thus, in order to prevent fraud in the Excise and Customs, there are many regulations, the infraction of which oftentimes fixes with penalties persons whose disobedience is unconnected with a fraudulent object. But as Lord *Tenterden* has said, such regulations are general, to secure a great object which could not otherwise be secured, and they must be generally obeyed. So it will happen that to effect a general object the Legislature uses language very large and comprehensive, with a view to secure the object which is deemed to be important, though in doing so cases not precisely within the object may be affected. The first duty of the Court is to look at the language of the Act, to see its plain meaning; and though the particular case may not come within the object, yet if it comes distinctly within the meaning of the language, the Court may sometimes be compelled to give effect to that which the language imports, and by such construction to include objects not within the full intention of the Act. It appears that originally Magna Charta, as commented upon by Lord Coke in 2nd Institute, page 65, and the Statute of Edw. I., point only at some of the reasons which it is to be inferred existed for passing the Act of 9 Geo. II.; but they also point to others which have ceased to be of importance, such as gifts in mortmain, having the effect of depriving lords of their fees, and the Crown of escheats. The 9 Geo. II., however, points at the evil caused by the disherison of heirs,

but

but **does** not of course take notice of those other reasons **which**, since the alteration has taken place in the feudal **nature** and tenure of property, have ceased to operate. **Another** reason is added, which may have been within the **intention** of the former Acts; namely, the circumstance of advantage being taken of languishing or dying **persons**.

1852.

MYERS

v.

PERIGAL.

It **remains** to be considered whether there is any difference in fact between this Banking Company and an ordinary partnership. It appears that the Company **carried** on their concerns through the agency of their **directors**, and were empowered to invest their capital in the **purchase** of land or by way of mortgage, and in various other modes; and it further appears that the general body had the control of the whole concern, at meetings called in a particular manner. Now the land and the mortgages and all other property which the partnership possessed, were always subject to the disposition of the general body of proprietors, and in the meantime to the disposition and control of what may be called the **managing** partners, or in other words the directors. It is **extremely** important, before this case can be determined, to consider, in the first place, whether a partnership so formed and carried on, is in any manner different from an ordinary partnership composed of a much less number of persons. In the next place, what is the effect of the Company having the complete control of this property. Suppose its deed of incorporation had provided that the produce of the land which the Company possessed should form a distinct fund, and be divided among the shareholders, would that have imported an interest, charge, or incumbrance on the land, or made any difference in principle from the system which actually prevailed, whereby the profit of the land was thrown into a fund



1852.  
 MYERS  
 v.  
 PERIGAL.

a fund formed partly of profits from land, partly of interest on mortgages, and partly of banking profits?


Since the passing of the Mortmain Act many cases have occurred on the construction of that Act of Parliament, and various views have been taken of it. In the case of *Hilton v. Giraud* (a), decided by Vice-Chancellor *Knight Bruce*, the question arose on shares, some of which were in Companies which were corporations incorporated by charter or Act of Parliament, and some in Companies which were not incorporated, and they were all treated as standing on the same footing as being not within the Act, and the observations of the learned Judge are general and applicable to all Companies, whether incorporated or not. In other cases also, the distinction has not even been adverted to.

I am prepared, as I have already stated, to give my judgment now, but it is much better that I should not express my views on the question, if either of the parties desire the opinion of a Court of law, and if they do they are entitled to have it, as the case is one well deserving of such consideration. [Mr. *Wetherell*, on behalf of the four charitable societies, elected to have a case for the opinion of a Court of law.] The observations I have made have been with a view of calling the attention of the bar to some matters which have not been remarked upon in the argument. I will mention two cases which are worthy of being considered, but being under a totally different head of law, they may not have attracted attention. One is the case of *Bartlett v. Brown* (b). There several persons formed a partnership for a fulling-mill; thirty-five of the number claimed to vote for the county in respect of their interest in the

(a) 1 *De G. & S.* 183.

(b) 7 *Man. & Gr.* 198.

lly-mill. The partnership was established by whereby it was agreed that the property should be d personal estate. The question came on in the of an appeal from the decision of the revising bar- who had held that the partners in the mill were ed to vote, and the Court of Common Pleas affirm- at decision. There is also another case which rs to me to be very relevant and important, where in brewers possessed considerable property in the e of houses, and one of the partners in the brewery is share in the partnership to charitable uses. The e was held to be within the Mortmain Act. It is rtant to consider what distinction can be established inciple between those two cases and the present. I considered all the cases which have been cited, and ularly the decisions of Lord *Langdale* and the Vice- cellor *Knight Bruce*, inasmuch as those are the ipal decisions in opposition to the previous current hority. I have attended with great respect to the ning on which those decisions are founded, but on hole I think it right that this case should be sub- d to a Court of law, and I have little doubt but that al matters relating to the important question before ill be more fully considered hereafter than they hitherto been.

1852.  
  
 MYERS  
 v.  
 PERIGAL.

---

ie following is the case which was stated for the on of the Court of Common Pleas :—


*mothy Myers* deceased, by his will, dated the 24th of *June* 1844, duly executed and attested (amongst things), directed his executors to convert into y all the residue of his personal estate, except his s in the *Durham* and *Northumberland* District Bank ewcastle, and to invest the proceeds in government  
 L. II.                      R R                      D. M. G. securities,

1852.  
 MYERS  
 v.  
 PERIGAL.

securities, and to pay the dividends arising therefrom, and the dividends arising from his said shares in the *Durham and Northumberland District Bank*, unto his wife *Anne Myers* for her life, and from and after her decease to sell and convert into money his said bank shares, and invest the same in government securities, which, with the government securities thereinbefore directed to be purchased, he directed to stand in his name for ever, and the proceeds thereof to be from time to time received by the following Societies, namely: The Society for promoting Christian Knowledge, The Society for propagating the Gospel in Foreign Parts, The Church Missionary Society, and The Church Building Society.

The testator died on the 4th of *February* 1845, leaving his said wife, now his widow, the Plaintiff in this suit, him surviving. The testator was, at the time of making his will and of his death, entitled to 560 shares in the *Durham and Northumberland District Bank at Newcastle*, in his will mentioned, which is a bank established and carried on in conformity with the provisions of an Act of Parliament passed in the 7th year of the reign of his late Majesty King *George IV.*, intituled, "An Act for the better regulating Copartnerships of certain Bankers in *England*, and for amending so much of an Act of the 39th and 40th Years of the Reign of his late Majesty King *George III.*, intituled, 'An Act for regulating an Agreement with the Governor and Company of the Bank of *England* for advancing the Sum of 3,000,000*l.* towards the Supply of the Service of the Year 1800, as relates to the same;' and by and under a deed of settlement dated the 1st day of *July* 1836, whereby it is (amongst other things) provided that they the said several persons parties thereto, all of whom were distinguished by the title of proprietors and the several other persons who, for the time being, should become and be the proprietors of shares in the capital of the

said Company, should constitute and form an association or public joint-stock copartnership to be called and should be called, "The *Northumberland and Durham District Banking Company*," to be managed and conducted under and subject to the several rules, regulations, provisions, and agreements thereafter contained; and that they, the said several parties thereto, should and would, from time to time and at all times, so long as they should respectively continue and remain members thereof, promote and advance the interests and prosperity of the same to the utmost of their power respectively, and the said Company should have continued until the same should be dissolved under or in pursuance of the provisions in that behalf thereafter contained. That the original capital or joint stock of the said Company for carrying on the same should consist of the sum of 500,000*l.* sterling, and should be divided into 50,000 shares of the amount of 10*l.* each share, but might be increased under the power for that purpose thereafter contained by additional shares, in such manner as thereafter expressed; and the shares which, at the date of the said indenture, had not been taken or subscribed for, and also those which might thereafter be created, as thereafter provided, should be allotted and distributed and disposed of to such persons, in such manner, and on such terms and conditions in every respect as the directors of the said copartnership bank for the time being should deem most conducive to the benefit and advantage of the Company. That the business of the Company thereby established should be exclusively confined to such as was usually carried on under the name of banking, including the issuing of notes of hand or bank notes, lending money on cash or other accounts, or on real, leasehold, or personal security, bills of exchange, promissory notes, or letters of credit, advancing money on the deposit of title deeds, goods, wares, and merchandize,

1852.  
  
 MYERS  
 v.  
 PERIGAL.

1852.  
 MYERS  
 v.  
 PERIGAL.

merchandize, discounting bills of exchange or promissory notes payable at or after sight, after date, or on demand borrowing or taking up money on receipt bills, promissory notes, or other obligations, including also purchases investments, dealings, or sales in or upon the government or public funds of Great Britain, Navy or Exchequer Bills, India Bonds, Bank or East India Stock shares of the stock of their own copartnership, or of the stock of the Bank of *England*, or annuities for one more life or lives or of any other description, and also including all other business and transactions usual in banking establishments, and consistent with the law then or thereafter to be in force concerning Joint-Stock Banking Companies and banking copartnerships, and the business of the Company should be so conducted as not to contravene any of the provisions of the said recited Act; provided always, that the funds of the said Company should not in any instance be invested in the stock funds, or loans, of any foreign country, or in the purchase of land or other real estate, except as therein after mentioned, articles of merchandize, mining concerns, other real adventures. That no benefit of survivorship should arise or take place amongst the shareholders of the said copartnership bank, and all the property of the Company, as between the shareholders thereof, and between the respective real and personal representatives should always be considered and deemed to be personal estate, so that each and every of the shareholders should as between and amongst themselves, have a distinct and separate right to his shares in the capital joint stock of the Company, and the same should be vested in him to all intents and purposes, and subject to his disposition by deed or will, or in cases of intestacy transmissible to his personal representatives as part of his personal estate, and distributed accordingly, but under and subject to such provisions in the deed of settlement

me

ent as should for the time being affect such shares, and also to his proportion of profits and losses as next thereafter mentioned. That each shareholder should be entitled to and interested in the profits, and be liable and subject to the losses of the Company in proportion to his shares in the capital fund or joint stock thereof. That previously to the meeting of the Company, to be held in the month of *July* 1837, as thereafter provided, and previously to the meeting to be held in *January* in the next and every subsequent year during the continuance of the Company, the directors should determine upon such dividend out of the clear profits of the Company as they in their judgment should think fit. That the directors should, within twenty-one days next after every such meeting at which any dividend should have been announced by them or any bonus should have been determined, cause the same dividend and bonus respectively to be divided amongst and paid to the shareholders respectively according and in proportion to the number of their respective shares, at such time and in such manner as the directors should think fit. That it should and might be lawful for the directors for the time being of the said Company, and they were thereby authorized and empowered to provide in *Newcastle-upon-Tyne*, and in such other towns and places as they might think fit, such houses, offices, or premises as they should from time to time deem requisite or expedient for carrying on and managing the business affairs and concerns of the Company, upon such terms and stipulations, and in such manner as they might deem advisable; and such directors might for those purposes, with and out of the funds of the Company, purchase in fee-simple or for any other estate, or take a lease of at a yearly or other rent or otherwise, any houses, buildings, or premises, or in the like manner purchase or take a lease of any land and erect and build any houses or buildings thereon, and keep such

1852.  
 MYERS  
 v.  
 PERIGAL.

1852.  
 MYERS  
 v.  
 PERIGAL.

such houses or buildings in repair for the purposes aforesaid, and fit up, adapt, and furnish the same for the use and purposes of the Company, and at the expense thereof, and the same lands, houses, and buildings, or any of them respectively, or any part thereof, should or might, from time to time and at all times afterward sell again, exchange, convey, assign, demise, let, or otherwise dispose of or deal with, for the benefit of the Company; and that such lands, houses, and buildings so purchased as aforesaid, should for the purposes of the said deed be deemed personal estate and part of the capital of the Company, and from time to time included in the valuation of capital, and should be vested in trustees for that purpose appointed on behalf of the Company, on such trusts as would effectually secure the object and intention of the said deed in relation thereto. That as to such of the funds and capital or property of the Company for the time being in the hands of the Company as should not be employed or appear necessary to be employed in the ordinary business thereof, the directors for the time being should, so far as they conveniently could, accumulate the same at interest, and for that purpose might from time to time lay out and invest the same, either in the names of the trustees for the time being of the Company or of such other persons as they the same directors might appoint, in or upon some or one of the parliamentary stocks or public funds of Great Britain, or in Navy or Exchequer bills, or in India bonds, or Bank or East India stock, or on mortgage, or purchase of freehold, copyhold, or leasehold lands, tenements, and hereditaments in Great Britain, or in the purchase of stock in this Company, or of annuities for one or more life or lives, or of any other description, as they might think proper; and any board of directors, when they should deem it expedient, might cause any of the funds or property so by this article authorized to

t

1852.

MYERS  
v.  
PERIGAL.

*be laid out and invested as aforesaid, to be disposed of, called in, or otherwise converted into money, and the money arising thereby to be again laid out and invested in and upon any of the stocks or securities as aforesaid, and so from time to time as occasion might require. That the general board of directors should also appoint two or more proper persons to be trustees of the said copartnership bank, in whose names or in the names of some or one of whom all grants, conveyances, and assurances of property in favour or for the use of the same copartnership, and all instruments and assurances for the security or for the indemnity thereof, and of the directors, officers, property, capital, stock, and effects thereof should be made and taken. That all securities, investments, and purchases, which in pursuance of the said indenture should be taken or made by or in the names of the said present or any future trustees or any other person or persons, in trust for or on account of the Company, and all monies and other property, estates and effects thereby secured or therein invested or accruing therefrom, should be under the control and subject to the order and disposition of the board of directors of the said copartnership bank for the time being; and every order or direction made in writing by the said board of directors touching the disposition of and dealing with the same securities, investments, and purchases respectively, should be obligatory on and observed by the said trustees or trustee, and should be a justification to them, and him and their and his indemnity, in acting in obedience to such order or direction; and all such trustees should, when required by the said board of directors, sign, seal, and execute, and should be bound to sign, seal, and execute, at the expense of the Company, such declaration of trust of the estates, securities, monies, and effects purchased, taken, holden, or possessed of or vested*



1852.  
 MYERS  
 v.  
 PERIGAL.

vested in them respectively on behalf of the Company, as such board of directors or their counsel should from time to time devise or require. That if in pursuance of any of the powers contained in the said indenture, the Company thereby established should be dissolved, the said board of directors should with all convenient speed wind up, settle, and bring to a final rest and balance the accounts and affairs of the Company; and for giving effect to such winding up and settlement, but for no other purpose, the Company and the powers of the directors, and the election of new directors to supply vacancies, should be held to be subsisting and continuing, anything thereinbefore contained to the contrary notwithstanding; and such of the funds and property of the Company as should not then consist of money, and so much of the capital and profits of the Company as should remain after answering the claims and demands thereon, should be paid to and distributed amongst the shareholders existing at the time of the dissolution, and their respective executors, administrators, or assigns, in the proportions in which they should then be respectively entitled thereto. The property of the said bank consists amongst other things of certain freehold and copyhold hereditaments, and money due on mortgage of freehold, or copyhold, or leasehold hereditaments.

The question in the case was, whether the bequest of the testator's shares in the *Durham and Northumberland District Bank*, from and after the decease of his wife *Ann Myers*, was a legal bequest within the Act 9 Geo. II. c. 36, intituled "An Act to restrain the Disposition of Lands, whereby the same became inalienable," reference being had to the deed of settlement of the said *Durham and Northumberland District Bank*.

The

1852.

MYERS  
v.  
PERIGAL.

The further hearing of the appeal was ordered to stand over until after the Judges had delivered their certificate. The Judges of the Court of Common Pleas made the following certificate (a) :—

“ This case has been argued before us by counsel. We have considered it, and are of opinion that the said bequest, made by the said will of the said testator, *Timothy Myers*, of his the said testator's shares in the *Durham and Northumberland* District Bank, from and after the decease of his wife *Ann Myers*, in his will named, is a legal bequest within the statute of the 9th year of the reign of King *George II.*, intituled ‘ An Act to restrain the Disposition of Lands, whereby the same became inalienable.’

“ JOHN JERVIS.

“ C. CRESSWELL.

“ EDWARD VAUGHAN WILLIAMS.

“ T. N. TALFOURD.”

The case now came on before the Lord Chancellor Lord *St. Leonards*, on the certificate of the Court of Common Pleas. Two questions were presented to the Court. First, whether the shares were legally given to the charities; and Secondly, whether, assuming they were not legally given, certain subsequent calls which had been made on the shares were payable out of the shares themselves, or out of the general residue.

Mr. *Craig* and Mr. *Wetherell*, for the charities, asked for a decree in conformity with the certificate.

Mr. *Elmsley* and Mr. *Faber*, for the Plaintiff, the widow of the testator, *contra*.

The question turns on the 3rd section of the Statute of Mortmain, 9 *Geo. II.* c. 36, which declares that “ all gifts, grants, conveyances, appointments, assurances, and settlements

(a) 11 *C. B. Rep.* 90.

1852.  
 MYERS  
 v.  
 PERIGAL.

settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or any charge or other incumbrance affecting or to affect lands," &c., shall be absolutely void. It having been ascertained that the property of the Bank, at the testator's death, consisted among other things of freehold and copyhold hereditaments, and money due on mortgage of freehold, copyhold, and leasehold hereditaments, the bequest of any share or interest in such bank clearly savours so much of realty as to be within the operation of the Statute of Mortmain, and therefore void. Such being the legal conclusion from the facts, no provision in the deed constituting the partnership can alter the nature of the property, *The King v. The Dock Company of Hull* (a), in which case the Company had bought lands for their docks, and their shares were by the act of incorporation declared to be personal estate, an exemption was on that account claimed from the probate rate; the Court held, that as between the heir and the executor it was to be considered personal property but that the Legislature did not intend to alter the nature of it in any other respect. It is immaterial whether the declaration is made by statute, or by deed or by will, the nature and incidents of the estate cannot be altered: *Flint v. Warren* (b), *Baxter v. Brown* (c). On the same principle real estate forming part of partnership property, and as such in equity considered personal estate, is exempt from probate duty, *Custance v. Bradshaw* (d). So money arising from the sale of real estate conveyed to trustees for the payment of debt though the estate was not sold till after the death of the debtor, was held not subject to probate duty, *Matson v. Swift* (e). So where partners had agreed among themselves

(a) 1 T. R. 219.

(b) 14 Sim. 554.

(c) 7 M. & Gr. 198.

(d) 4 Hare, 315.

(e) 8 Beav. 368.

themselves that their interest in certain freehold estate was to be considered personal estate, such declaration being for a collateral purpose did not prevent their right to vote in respect of such freehold interest, *Baxter v. Brown* (a), the Court observing, page 215, "We think the generality of these words must necessarily be limited by the subject-matter of the trusts declared by the deed, and that they can extend no further than the object and purposes of the deed require; and further, we think it may be considered as a very doubtful question whether the private agreement of parties, or any authority short of that of an Act of Parliament, can deprive the owners of the freehold of the right of voting for a member of Parliament, which is a right inherent in the owners of the freehold, not for their own benefit, but for that of the community of which they form a part." The argument of the Appellants must go to the extreme length of asserting that the Company has no estate or interest in lands whatever. We submit that for every other purpose than that defined by the deed, the right remains unaffected, and that it is a purpose wholly collateral to the deed, whether or not the shares be or not within the Statute of Mortmain. Nothing is better settled than that whenever real estate is directed to be sold for the purpose of being given to a charity, the legacy is void, *Page v. Leapingwell* (b); there can be no difference where the property forms part of partnership assets. It is also clear that but for the provision in this deed declaring the shares to be personal estate, the bequest would be within the statute; but it surely is not competent for persons by any arrangement among themselves to contravene an express statutory enactment. All the earlier authorities show that Courts of Equity have been desirous to carry out the intention of the Mortmain Act to the letter: thus the benefit

1852.  
 MYERS  
 v.  
 PERIGAL.

(a) 7 M. & Gr. 198.

(b) 18 Ves. 463.

secured on poor rates, *Finch v. Squire* (d); and shares, though declared personal estate and transferable as such, *Tomlinson v. Tomlinson* (e). The first which at all impugned these authorities, was *The Attorney-General v. Giles*, decided by Lord Langdale, when Master of the Rolls, in 1835, *Shelford v. Mortmain*, pp. 266, 987, when he held that the stock of the India Company was not void; but the Judge there states that bank stock would be more likely to be affected by the Statute of Mortmain. In the subsequent cases of *March v. The Attorney-General*, *Sparling v. Parker* (g), and *Walker v. Milne* (h) *Langdale* followed the authority of *The Attorney-General v. Giles*, which seems also to have been followed by Vice-Chancellor Knight Bruce, in the cases of *Ellis v. Giraud* (i), and *Ashton v. Lord Langdale* (k). It may be observed that in almost all these cases the Companies were incorporated Companies, and formed with a view to an existence *in perpetuum*, where the real estate was only for the purposes of trade.

Mr. Renshaw, for the next of kin, referred to *Attorney-General v. Jones* (l).

Mr. Teed and Mr. W. Hughes, for the Executors,

(a) *Amb.* 367.

(b) 4 *Ves.* 430, n.

(c) 4 *Ves.* 542.

(g) 9 *Beav.* 450.

(h) 11 *Beav.* 507.

(i) 1 *De G. & S.* 18.

*The* LORD CHANCELLOR, without calling for a reply—

There is no doubt that wherever anything savouring of realty is given by will to a charity, the legacy is within the prohibition of the Statute of Mortmain. The words of the Act are very explicit, and include all “hereditaments corporeal or incorporeal whatsoever.”

1852.

MYERS  
v.  
PERIGAL.

The cases of *Negus v. Coulter* (a), and *The Attorney-General v. Jones* (b), to which I have been referred by the Respondents, are clear enough. In the former case, the right to lay mooring-chains in the *Thames* was construed to be such an interest in real estate as to be within the operation of the statute. In the latter case, the profits arising from the tolls of a lighthouse were held to be real property. Some of the authorities cited have gone considerable lengths, as for instance the case of *Knapp v. Williams* (c), where there was the bequest of sums secured by a mortgage of turnpike tolls; but in that case it is to be observed there was an actual assignment of the real property on which the tolls were secured: there was therefore something more than mere savouring of realty. With respect to the cases more like the present, it is impossible to deny that the current of modern decisions is against the older cases, and that while there is to be discovered an inclination formerly to carry the provisions of the Act beyond the intention of the Legislature, the tendency of modern decisions has been the other way. My inclination is neither to the one side nor to the other. I desire to give such a construction to the statute as shall satisfy its terms, and meet the intention of the Legislature. The question before me is, whether the Legislature did or did not intend to strike at interests of this nature. If we look at the intention of the

(a) *Amb.* 367. (b) 1 *Mac. & G.* 574. (c) 4 *Ves.* 430, n.

1852.  
 MYERS  
 v.  
 PERIGAL.

the purchaser of these shares, it is obvious that he no more intended to buy an interest in any real estate, which might form part of the partnership property, than to buy a portion of the real estate for his own use. By the very construction of the partnership deed such real estate would have gone to his personal representatives, and his real representative could not have taken any portion of the estate by descent. Undoubtedly, as was put in the argument, a state of circumstances might arise in which one man might either be the survivor or the purchaser of the interests of his partners in the Company, and thus become the possessor of the real estate; but assuming such a result, he would take it in a new light, he would find himself owner of real estate, and being the owner, he might of course elect to retain it as real estate. The Respondents are under the necessity of admitting that real property purchased for the purpose of carrying on a trade would not fall within the statute. But why not? Take the case of a Dock Company; the dock itself is constructed upon real estate, that remains realty while the partnership remains, but it is not denied at the bar that the buildings and office of the Company would not be real estate within the Statute of Mortmain; and the reason simply is, that the subject is of itself a necessary incident to the trade. Suppose this very Company had bought real estate for the purpose of its trade, just as they might have bought a ship: it surely would have been competent for them to have done so.

The true way to test it would be, to assume that there is real estate of the Company vested in the proper persons under the provisions of the partnership deed. Could any of the partners enter upon the lands, or claim an portion of the real estate for his private purposes? Or  
 the

There was a house upon the land, could any two or more of the members enter into the occupation of such house? They apprehend they clearly could not; they would have no right to step upon the land; their whole interest in the property of the Company is with reference to the shares bought, which represent their proportions of the profits. No incumbrancer of an individual member of the Company would have any such right. In short, a member has no higher interest in the real estate of the Company than that of an ordinary partner seeking his share of the profits out of whatever property those profits might be found to have resulted. If he die at one particular time, he will leave the same interest in the partnership property, although that may consist of real estate at one period and not at another. The quality of the partnership property can neither alter its destination nor the quantum of a member's interest. Upon all principle, therefore, I think it is perfectly clear that this bequest is not within the statute.

1852.  
MYERS  
v.  
PERIGAL.

The cases of *Custance v. Bradshaw* (a), and *Matson v. Wist* (b), on the non-liability of real property to probate duty; and *The King v. The Dock Company of Hull* (c), as to the rateability of docks to poor rates, though the members of the Company creating the docks were declared personality by their Act of incorporation, are not in point: it is quite obvious that no agreement among the members of a partnership as to the quality in which they hold and enjoy land can affect its rateability, or warrant an imposition of, or an exemption from, a rate. Land is liable, as stock in trade is liable, for poor rate, and that stock in trade is annually exempted from liability. The cases on the probate duty have still less

*Hare*, 315. (b) 8 *Beav.* 368. (c) 1 *T. R.* 219.



1852.  
 MYERS  
 v.  
 PERIGAL.

less application. A more difficult question arises from the consideration of the decision in *Baxter v. Brown* (a). I have some difficulty in reconciling that case with the later authorities; but looking at the Act of Parliament regulating the qualification to vote, it gives the same right to vote in respect of an equitable interest as the legal ownership; and the decision, therefore, only amounted to this, that the right to vote being conferred by Act of Parliament could not be taken away except by Act of Parliament. If such was not the effect of the decision, it is undistinguishable from the later decision of the same Court, which has now certified that this case does not fall within the Statute of Mortmain. I am consequently relieved from the weight of the authority of *Baxter v. Brown* (a). I must say I think the case of *Walker v. Milne* (b) went further than the present, because there part of the property being canal bonds, there was an actual assignment of "the undertaking, and all and singular the rates," &c. I am not, however, called upon to express any opinion upon that case. I have only to consider whether this testator, as a partner in the bank, had such an interest as would deprive him of the power of disposing of it in the manner he has done. My opinion is, he had not such an interest, and that the certificate of the Court of Common Pleas is correct. The judgment, therefore, of the Vice-Chancellor must be reversed; the costs will be paid out of the residue, and as that residue consists of realty and personalty, the costs must be borne rateably.

(a) 7 M. & Gr. 198.

(b) 11 Beav. 507.

1852.

STUMP v. GABY.

Dec. 11.

**THIS** was an appeal by the Plaintiff *James White Stump*, suing *in formâ pauperis*, from the decision of the Vice-Chancellor Lord *Cranworth* allowing a plea of the Plaintiff's bill.

Before *The Lord Chancellor* LORD ST. LEONARDS.

The Bill was filed on the 2nd *January* 1851 by *J. W. Stump*, against *Edward Gaby*, *Mary Ann Gaby*, and *Thomas Alexander*, and certain other parties whom the Plaintiff alleged were heirs in coparcenary with him of *Ayliffe White*. The bill in substance stated that *Ayliffe White*, by his will bearing date the 2nd *September* 1800, devised the estates which were the subject of the bill to his eldest son *Henry Boswell White* for life, with remainder to *Ayliffe White* the son of the said *H. B. White* for life, with remainder to the first and other sons of *A. White* the grandson in tail male, with remainder to the second and other sons of *Henry Boswell White* in tail male, with remainder to the testator's second and third sons *Francis* and *John White* successively for their respective lives, with remainder to their first and other sons successively in tail male, with remainder to the testator's right heirs. The bill stated that *Henry Boswell White* died in 1774, leaving his son *Ayliffe White* the grandson of the testator, his only child him surviving, that *Ayliffe White* the grandson entered into possession of the estate, and continued in such possession until

The plaintiff claimed, as heir-at-law of *A.*, who, as the bill alleged, when in very embarrassed circumstances, had executed a voidable conveyance to his solicitor. The bill after stating a pretence on the part of the Defendants, who claimed under the solicitor, that *A.* had confirmed the conveyance by his will, charged that he had died intestate as to the premises in question, and prayed that the conveyance and any testamentary dis-

position by him in confirmation thereof might be declared null and void. Plea, *A.* by will, after reciting the probability of the conveyance being disputed, ratified and confirmed it, allowed.

Assuming that the conveyance was voidable, the interest which remained in the estate after its execution was not a right of entry under the old law, but an equitable estate which was clearly devisable.

1852.

STUMP

v.

GABY.

his death without issue in 1826. The bill alleged that upon the decease of *A. White* the grandson without issue *Elizabeth Salisbury* the wife of *John Wilkins* and mother of the Defendant *John Clark Wilkins*, and *Mary de Lyons* the wife of *Joseph Stump* and mother of the Plaintiff, and the Defendant *Ann Sutton* the wife of *John Sutton*, and *Sophia* the wife of *John Henly* and mother of the Defendant *Robert John Henly*, and *Harriet* the wife of *Sydenham Bailey* and mother of the Defendant *Sydenham Wood Bailey* were the only surviving great grandchildren of the said testator *Ayliffe White* (the grandfather) and his right heirs in coparcenary; and that *Mary de Lyons Stump* was under coverture at the death of *A. White* the grandson, and remained so until the 22nd May 1841.

The Bill stated that the Defendants *Edward Gaby*, *Mary Ann Gaby*, and *Thomas Alexander* were then in the actual possession or in the receipt of the rents and profits of the premises in question, and had got possession of the title-deeds, and pretended that *A. White* the grandson had executed during his lifetime some assurance or assurances whereby, for a sufficient consideration, he conveyed the inheritance of or in the premises to or in such manner as that the same or some part or parts thereof were then vested in the Defendants *E. Gaby*, *M. A. Gaby*, and *T. Alexander*, or some one of them for an estate of inheritance, and that he confirmed such conveyance or assurance by some testamentary disposition; whereas the Plaintiff charged the contrary, and that no interest in the premises or any part thereof passed by any instrument executed by *A. White* (the grandson) during his lifetime which extended beyond his life.

The Bill charged that *A. White* (the grandson) was during his life in very embarrassed circumstances, and in

a prison or under arrest for debt, and that one *Ralph Hale Gaby* (then deceased) during the lifetime of *A. White* the grandson, acted as his attorney or solicitor, and that whilst acting in such capacity, and taking advantage of the embarrassments of *A. White* the grandson, and of his being under arrest, obtained from him a deed of assignment or other assurance of his interest in the premises, upon an express trust or confidence, and for a wholly inadequate consideration, and that under colour of such assignment or other assurance, upon such trust or confidence *Ralph Hale Gaby* entered into the receipt of the rents and profits of the premises, and that the Defendants *E. Gaby*, *M. A. Gaby*, and *T. Alexander* claim through and under *R. H. Gaby*, and by virtue of the said assignment or other assurance, and that they are *de facto* trustees of the premises for the benefit of the Plaintiff and the other coparceners.

1852.

STUMP  
v.  
GABY.

The Bill charged that the Defendants *E. Gaby*, *M. A. Gaby*, and *T. Alexander* pretended that *A. White* the grandson had some estate, right, or interest in the hereditaments devised by the will of *A. White* the grandfather, which he had power to dispose of by will, and that he did so dispose thereof; whereas the Plaintiff alleged that the said *A. White* the grandson died intestate as to any interest he might have had therein, and that upon his death, the interest, if any, which he therein, devolved upon the Plaintiff's mother and said other coparceners, as the co-heiresses at law of said *A. White* the grandson.

The Bill prayed *inter alia* that the rights of the Plaintiff under the will of *A. White* the grandfather might be ascertained and declared, and that any deed or deeds which might appear to have been executed by *A. White*

1852.

STUMP

v.

GABY.

the grandson in manner therein charged, and a mentary disposition by *A. White* the grandson firmation thereof, might be declared null and against the Plaintiff, and that the Defendants *M. A. Gaby*, and *T. Alexander* might be decreed up possession of the premises to the Plaintiff, with all deeds and muniments of title relating

To this Bill the Defendant *T. Alexander* put in following Plea in bar:—That after the decease of *Hewell White, Ayliffe White* the grandson duly made lished his last will dated the 22nd *September* 1819 it, so far as it is material to state it, after disposing of certain portions of his real estates not now in question and devised all the rest, residue, and remainder of his real and personal estate whatsoever and wheresoever to his wife *Hester Maria White*, subject to the payment of her debts and funeral expenses, to hold to her, her heirs, executors, administrators, and assigns for ever, according to the respective natures and qualities thereof; and afterwards the said *Ayliffe White* the grandson made and published a codicil to his said will dated the 17th *March* 1820, and thereby gave and devised the words and figures following, that is to say: “as some time in the year of our Lord 1812, I conveyed to *Ralph Hale Gaby, Nathan Atherton, William Whitworth*, the reversion in fee of certain messuages, farms, lands, and hereditaments in the parish of *St. Michael*, in the county of *Wilts*, expectant to come into possession on my decease without subject to an annuity of 150*l.* to my wife; and I joined in granting and confirming to the said *Hale Gaby* the reversion in fee of my farm then in the occupation of *Joseph Stump*, which I had before conveyed to the said *Nathan Atherton*. And when *Wilkins*, who intermarried with one of the fi

*Henry White*, has thought proper to threaten that such conveyances shall be disputed. Now in order to prevent all dispute, I hereby ratify and confirm the conveyances made to them the said *Ralph Hale Gaby*, *Nathan Atherton*, and *William Whitworth*, of the said estates and hereditaments, subject to the annuity aforesaid ;” and for further assurance and confirmation, subject to the annuity the testator gave and devised the same estates to the said *R. H. Gaby*, *N. Atherton*, and *W. Whitworth* absolutely. The Plea concluded by stating that the said *A. White* the grandson died without having revoked or altered his said will, save by the said codicil, and without having revoked or altered his said codicil, and that he left the said *Hester Maria White*, *Ralph Hale Gaby*, *Nathan Atherton*, *William Whitworth*, and *John Smith*, him surviving.

1852.

STUMP

v.

GABY.

The Vice-Chancellor having allowed this plea the Plaintiff appealed.

Sir *W. Page Wood* and Mr. *Cottrell*, in support of the appeal.

The plea is defective in matter of form as not covering every possible view of the Plaintiff's case. The bill charges that *A. White* the grandson had no devisable interest in the premises ; the plea ought to have stated that he had in him the estate at the time of his death. We submit that the conveyance was fraudulently obtained, and if we are entitled to set it aside, we shall also be entitled to set aside the will. The plea also ought to have answered the allegation in the bill that *A. White* the grandson had executed the conveyance to his own solicitor under duress. On the pleadings, therefore, it must be assumed that the conveyance was, as the bill alleges, fraudulently obtained, and though not absolutely void, yet was voidable. Even if it had been set aside in the

1852.

STUMP

v.

GABY.

the lifetime of *A. White* the grandson, a devise of the estates, or rather of the mere right of entry, would not have operated to pass such estates without a reconveyance; for under the law as it stood at the time when *A. White* the grandson made his will he had no devisable interest in the premises. In the case of *Cave v. Holford* (a), Lord Chief Justice *Eyre* observes on this head, "By construction upon the statute a will can operate only upon the estate the testator had at the time he executed it; therefore, pleading it must be stated that the party was seised, that he afterwards devised, and that he died so seised. If the estate, therefore, comes back with modifications of the whole interest, or he takes back an estate by purchase, the will cannot operate upon the new estate, totally independent of the law of revocation: it is not the same estate strictly speaking." So in the case of the *Attorney-General v. Vigor* (b), where a person had exchanged his lands for others, the title to which proved bad, it was held that his will did not operate upon his own lands which after his death were restored to his heir. In that case Lord *Eldon* observes: "Suppose there was a republication of the will after the disseisin and before re-entry, that republication would not pass the estate, for the same reason, that if at the date of the will he had nothing but a right of entry, that will would not pass it. The opinion of Lord *Holt*, who was as great a lawyer as ever sat in *Westminster Hall*, was, that if he had not entered the will would continue revoked, because at his death he had nothing but a right of entry." The conveyance itself being voidable by reason of the alleged fraud, was not susceptible of being confirmed by a simple instrument, as the will here set up, which was evidently obtained by the solicitor exerting the same undue influence; and to use the language of the Court, in the old case was, "a contrivance only to double-hatch the cheat."

(a) 3 *Ves.* 650; see p. 664.(b) 8 *Ves.* 256; see p. 282.

cheat:" *Wiseman v. Beake* (a). Under such circumstances a Court of equity imposes an obligation on the party deriving a benefit from the instrument of confirmation, to show by the clearest evidence that the act of confirmation was done with all the deliberation that ought to attend a transaction, the effect of which is to ratify that which in justice ought never to have taken place : *Roche v. O'Brien* (b), *Dunbar v. Tredennick* (c), *Crowe v. Ballard* (d).

1852.  
STUMP  
v.  
GABY.

Mr. Bethell and Mr. J. V. Prior, who appeared for the Respondents, were not called upon.

*The LORD CHANCELLOR.*

I think the question raised on this appeal as to the effect of a devise after a voidable contract is concluded by authority. Here the case set up by the bill is, that a person under whom the Plaintiff claims executed a conveyance to his attorney which could be set aside on equitable grounds. The plea in answer says (and it appears to me completely to cover the charge on which the equity of the bill is founded), the person under whom you (the Plaintiff) claim having the reversion in fee, and whose deed you seek to set aside, has himself confirmed that deed by devising the estate to the person who took under the deed. The Plaintiff has endeavoured, in the argument, to meet the plea by contending, first, that, under the law as it stood at the date of the transaction in question, it was not competent for a person to devise a right of entry, and that this was a mere right of entry, but it has to be established that this was a mere right of entry; and, secondly, that the confirmation was of no avail, because it was not shown that the person confirming was made aware of all the circumstances under which the fraud existed and of his right to have the former voidable instrument

(a) 2 Vern. 121.

(b) 1 B. & B. 330.

(c) 2 B. & B. 304.

(d) 3 B. C. C. 117.



1852.

STUMP

v.

GABY.

strument set aside. With respect to the first point, am clearly of opinion that this was not a right of entry the whole legal fee-simple passed by the conveyance; the person, therefore, who executed that conveyance could have had no right of entry; whether the deed was or not such as could be maintained in a Court of equity is another question, but there was no legal remedy, for the case is not put as one of such gross fraud as that the conveyance was, on the face of it, void at law.

I do not deny that a deed may be so fraudulent as to be set aside at law; this, however, is not such a case but I will assume that the conveyance might have been set aside in equity for fraud: what then is the interest of a party in an estate which he has conveyed to his attorney under circumstances which would give a right to this Court to have the conveyance set aside? In the view of this Court he remains the owner, subject to the repayment of the money which has been advanced to the attorney, and the consequence is that he may devise the estate, not as a legal estate, but as an equitable estate, wholly irrespective of all question as to any right of entry or action, leaving the conveyance to have its full operation at law, but looking at the equitable right to have it set aside in this Court. The testator therefore had a devisable interest. My strong impression is that the very point is concluded upon authority, but if not I am ready to make an authority on the present occasion, and to decide that, assuming the conveyance to have been voidable, the grantor had an equitable estate which he might have devised, and that being so he has in the clear terms devised the estate, and thereby prevented the descent to his heir-at-law. I give no opinion as to what would have been the case if he had not devised the estate.

A conveyance by a client to his attorney may or not be

good

good in this Court ; it is certainly good at law unless there is **such** gross fraud as that a jury would find that there was no **deed** at all executed ; but a deed properly executed from a **client** to his solicitor is *primâ facie* good and can only be **impeached** in this Court on equitable grounds. Now assuming the conveyance to be impeachable, the grantor, addressing himself to the very case, expressly refers in the **codicil** to the possible dispute by a member of the **family**, and says, " In order to prevent all dispute, I hereby ratify and confirm the conveyances," &c. It was, however, said that there was something in the old Statute of Wills which prevented that confirmation, and that the testator had not an estate in him at the date of his **will** for that will to operate upon, but I have already expressed my opinion that he had the equitable and therefore a devisable estate.

1852.

STUMP  
v.  
GABY.

It is beyond dispute that a man may, if he pleases, confirm a voidable conveyance ; and if a client, dealing with his solicitor, executes a voidable instrument, and afterwards chooses to confirm it by will, he clearly may. The difference between the confirmation of such an instrument by a contract between the same parties, and a testamentary disposition is, that where a client deals with an attorney, and the latter commits what may be considered a fraud in this Court, and then induces the client to confirm that dealing, the attorney has to show that the confirmation was made by the client with a full knowledge of his rights to set aside the conveyance. I have nothing to do with such case, nor do I wish to disturb the decisions on that head ; but here there was no such dealing, the party was disposing of his own property by will in favour of a person with whom he had previously been dealing, and it was equally competent for him to have disposed of the same property in favour of any other individual.

It

1852.

STUMP  
v.  
GABY.

It was a testamentary act, it was not a matter of contract, and the will therefore is the guide under which the Court must act; the testator has devised the estate upon express terms, and my opinion is, that if he had not devised it, but had simply said, referring to the prior confirmation, "I confirm it," that alone would have been a confirmation. I have no doubt as to the propriety of the decision of the Court below, and if this was a pauper case, I should dismiss the appeal with cost.

June 25.

## ENTHOVEN v. COBB.

Before *The*  
LORDS JUSTICES.

The attorney of the Plaintiffs in an action communicated to the Plaintiffs in another action against the same Defendant and involving substantially the same question, a case and opinion taken on behalf of the Plaintiffs in the former action, with permission to copy it. The Defendant in the actions filed a bill of discovery against the Plaintiffs to whom the case and opinion had been lent: *Held*,

THIS was an appeal from the decision of Vice-chancellor *Parker*, refusing a motion for the production of documents so far as regarded a copy of a case, the opinions thereon, which was admitted to be in the Defendant's custody.

The material facts are stated in the report of the Vice-Chancellor, in the 5th Volume of *De Gex & Smale's Reports*, p. 597.

The bill was one for discovery in aid of the defence in an action brought by the Defendant in equity for money alleged to have been lent on the security of certain debentures, the question in the action being whether the money was not paid upon a purchase of the debentures instead of being advanced as a loan. According to the statements in the answer, and of an affidavit in connection with the motion, the case and opinions in question had been taken on behalf of two ladies named *Misses* who had advanced money upon other bonds of the same kind and under similar circumstances, and who had brought against the Plaintiff in equity an action in which they claimed that they could not be compelled to produce the copy which they had made of the case and opinion.

an **appeal** was still pending in the House of Lords, and the **case** and opinions had been lent by the solicitor of the **Misses Hoyle** to the solicitor of the present Defendants, with permission to copy it, in pursuance of which permission the copy of the case and opinions in question had **been** made.

1852.  
ENTHOVEN  
v.  
COBB.

**Mr. Wigram** and **Mr. Rawlinson**, for the Appellants.

**The** circumstances of this case do not bring it within any **of** the authorities affording protection from discovery. **The** document does not contain any statement of the present Defendants' case. It was not submitted to counsel for **them**, nor was the opinion taken on their behalf. At the **utmost** it is analogous to a communication between two **co-Defendants**. Such a communication has never been held to be privileged. It is not contended that any restriction was placed by the Misses *Hoyle* or their solicitor upon the present Defendants as to the use which they were to make of the case, nor that the present Defendants have entered into any engagement inconsistent with their producing the case in this suit.

**They** referred to *Desborough v. Rawlins* (a), *Greenough v. Gaskell* (b), *Whitbread v. Gurney* (c), *Storey v. Lord George Lennox* (d), *Goodall v. Little* (e), *Glyn v. Caulfield* (f), *Greenlaw v. King* (g), *Spenceley v. Schulenburg* (h), *Sawyer v. Birchmore* (i), *Balguy v. Broadhurst* (k), *Holmes v. Baddeley* (l), *Curling v. Perring* (m), *Parkhurst v. Lowten* (n).

Mr.

- |                                                            |                                 |
|------------------------------------------------------------|---------------------------------|
| (a) 3 <i>Myl. &amp; Cr.</i> 515.                           | (g) 1 <i>Beav.</i> 137.         |
| (b) 1 <i>Myl. &amp; K.</i> 98.                             | (h) 7 <i>East</i> , 357.        |
| (c) <i>Younge</i> , 541.                                   | (i) 3 <i>Myl. &amp; K.</i> 572. |
| (d) 1 <i>Keen</i> , 341; 1 <i>Myl. &amp; Cr.</i> 525, 685. | (k) 1 <i>Sim. N. S.</i> 111.    |
| (e) 1 <i>Sim. N. S.</i> 155.                               | (l) 1 <i>Phil.</i> 478.         |
| (f) 3 <i>Mac. &amp; G.</i> 463.                            | (m) 2 <i>Myl. &amp; K.</i> 380. |
|                                                            | (n) 2 <i>Swanst.</i> 194.       |

1852.  
 ENTHOVEN  
 v.  
 COBB.

Mr. *Malins* and Mr. *Karslake*, for the Defendants, were not called upon.

*The* LORD JUSTICE KNIGHT BRUCE.

The document in question is a copy of a case and of the opinion of counsel upon it, taken on behalf of two ladies of the name of *Hoyle*, who claimed to be creditors of a person of the name of *Enthoven*. These ladies sued him at law, and obtained, as I understand, a verdict or judgment or both against him, the effect of which is suspended by a bill of exceptions now before the House of Lords; so that the possible effect of the writ of error may be a *venire de novo*, in which case the matter in dispute would have to be tried again. It appears that Messrs. *Cobb*, who are the Defendants on the present record, also claim to be creditors of Mr. *Enthoven*, the same gentleman, and are suing him or intending to sue him at law. In aid of his defence and for the purpose of discovery this bill is filed; but the circumstances under which Messrs. *Cobb* claim to be creditors, if not identical with those under which the ladies claim to be creditors, are very similar, and connected with them as I understand; so much so, that the ladies have through their solicitor taken the opinion of counsel, and communicated that case and that opinion to the solicitor of Messrs. *Cobb* as having a common cause substantially with them against Mr. *Enthoven*, their common object of pursuit. Now the first question is, for what purpose, with what view, upon the materials before us, we ought to infer that the case and opinion were communicated with permission to copy them. In my opinion, the just and inevitable inference is, that the communication was not made for the purpose of allowing unlimited publication and use, but was made in confidence for the limited and restricted purpose of assisting them in that claim which was, for every substantial purpose, common with  
 that

that of the ladies, whose solicitor lent it to them. I infer, therefore, from the materials before the Court, that it would be an unjust and unlawful act on the part of the present Defendants to allow that case and opinion, or a copy of it which is the same thing, to be published, or even to be communicated in any manner, except for the purpose of the defence. I consider that these ladies had and still have a material interest in the document, the production of which to their own adversary is sought by this application. Without entering into other questions which, with propriety and ability, have been discussed upon this motion, it is sufficient for me to be satisfied that the interest of the ladies, their rights with respect to these documents, and the limited purposes for which the documents were communicated, do of themselves preclude all right on the part of the Plaintiff to the production of the documents or discovery of their contents. We agree entirely with the decision of the Vice-Chancellor.

1852.  
ENTHOVEN  
v.  
COBB.

*The* LORD JUSTICE LORD CRANWORTH.

The authorities which have been cited are beside this question. In those cases the question has been between the Plaintiff and the Defendant. In this case the Defendant has no right as between himself and a third person to produce the documents.

---

1852.

July 20. In the Matter of THE JOINT-STOCK COMPANIES  
WINDING-UP ACTS, 1848 and 1849;

AND OF

THE GREAT WESTERN EXTENSION ATMOSPHERIC RAILWAY COMPANY.

## WRYGHTE'S CASE.

Before *The*  
LORDS JUSTICES.

Under an order for winding up a Company under the Joint-stock Companies Winding-up Acts, the Master has no jurisdiction to admit a claim of a creditor of some members only of the Association directed to be wound up, although the debt may have been contracted for the purposes of the Association.

THIS was an appeal from a decision of the Master charged with the execution of the order for winding up the above Company. By the decision in question the Master had disallowed two claims of 2000*l.* and 500*l.* against certain contributories being directors of the Company. The appeal was heard by their Lordships without being first brought before the Vice-Chancellor *Parker*, their Lordships on account of the pressure of business in the Vice-Chancellor's court having consented to hear original motions.

Some of the circumstances of the case are stated in the report upon a former appeal from the Master on a different question, in 5 *De Gex & Smale*, 244.

The following are the facts material to the present question :—

In *October* 1845, some of the directors of the Great Western Extension Atmospheric Railway Company determined upon borrowing from the *Tring, Reading*, and *Basingstoke* Railway Company a sum of 2000*l.* On the 23rd of *October* 1845 a meeting of the directors of the latter Company was held, at which a resolution was passed

1852.

WRIGHT'S  
CASE.

ssed that 2000*l.* should be lent and advanced to the  
ectors of the former Company upon their personal  
'po*n*sibility, for a time not exceeding three months, at  
e rate of 5*l.* per centum per annum : and the solicitor  
the former Company was authorized to carry into  
ect an arrangement for completing the loan.

The advance was accordingly made upon a memoran-  
um being signed by twelve of the directors of the At-  
mospheric Company, in the following terms :—

“ Great Western Extension Railway Company.

“ To *G. P. Hill*, Esq. “ October 27, 1845.

“ In consideration of your lending and advancing to  
us, the undersigned, the sum of 2000*l.*, we hereby  
jointly and severally guarantee to you the repayment of  
the same, with interest at 5*l.* per cent. per annum,  
within three months from the date hereof.”

A further loan of 500*l.* was afterwards made by the  
directors of the *Tring, Reading, and Basingstoke* Rail-  
way Company upon another memorandum being signed  
by ten of the directors of the Atmospheric Company,  
and delivered to the solicitors of the other Company :—

“ Great Western Extension Atmospheric  
Railway Company.

“ To Mr. *G. P. Hill*.

“ In consideration of your advancing and lending to  
us 500*l.* we hereby jointly and severally promise and un-  
dertake to repay to you that sum, with 5*l.* per cent. in-  
terest, on the 1st day of *February* next.—Dated the 24th  
*November* 1845.”

Orders had been made, under the Winding-up Acts,  
for winding up both Companies, and under that for  
winding up



1852.  
 WRYGHTE'S  
 CASE.

winding up the Atmospheric Company the official manager of the other Company carried in claims for the 2000*l.* and the 500*l.* The former claim was in the following terms :—

“The said *W. C. Wryghte*, as such official manager as aforesaid, claims of the following parties, as contributories in the above-mentioned Great Western Extension Atmospheric Railway Company, that is to say, [the nine persons who signed the first guarantee] being the persons who signed the guarantee of the 4th of *October* 1845, and who have been settled on the list of contributories of the said Company as contributories thereof, the sum of 2000*l.* with interest thereon from the 24th of *October* 1845, until payment for money lent and advanced on the said 24th of *October* 1845, by the directors of the *Tring, Reading, and Basingstoke* Railway Company, to and for the use of the Great Western Extension Atmospheric Railway Company, of which Company the said several persons were then directors.”

The other claim was similarly framed.

Mr. *Daniel* and Mr. *Roxburgh*, for the Appellant.

These claims, which were originally made against the whole Company, were afterwards only tendered against the directors who signed the guarantees. The charge was carried in on the authority of *Lloyd's case* (a), and *Carrick's case* (b).

[The LORD JUSTICE LORD CRANWORTH.—All that decided in *Lloyd's case* and *Carrick's case* was this, that where an attempt is made to prove against the whole body of contributories a debt which has been contracted by

(a) 1 *Sim. N. S.* 248.

(b) 1 *Sim. N. S.* 505.

some of them, it is necessary, before the debt can be admitted, to show that it was authorized to be contracted, either expressly or impliedly, by the whole body. I have never decided that, under a winding-up order, a debt or claim can be proved against some out of a body of contributories, unless the debt has been contracted so as to bind the whole.]

1852.  
WRIGHT'S  
CASE.

[*The* LORD JUSTICE KNIGHT BRUCE.—This attempt at winding up a Company jointly and severally is nothing new.]

Unless such a course can be adopted, the affairs of a company like the present cannot be wound up consistently with the decisions in *Carrick's case* (a) and *Lloyd's case* (b). As it is not disputed that the Company have had the benefit of this advance, they must be liable to repay it, although the immediate claim may be against the directors.

*The* LORD JUSTICE KNIGHT BRUCE.

The Company or Association in this case directed to be wound up is the Great Western Extension Atmospheric Railway Company: of which it seems that the other company now claiming did at one time suppose themselves to be creditors. They may or may not have been so; that question is not before us. The question raised before us is, whether, under the order in the present case, the Master could take cognisance of a demand not alleged to be due from the Association directed to be wound up, but from some and only some of the persons who happened to be members of it. My opinion is, that the Master had no jurisdiction to enter

(a) 1 Sim. N. S. 505.

(b) 1 Sim. N. S. 248.

1852.  
 WRIGHT'S  
 CASE.

enter into such a matter. It has been said to be convenient and just that he should have the jurisdiction, inasmuch as in this particular instance the money in respect of which the claim is made was applied for the purposes of the Company. That circumstance can make no difference in the principle or in the rights of the parties. The purpose for which the money was applied is immaterial. If such a demand is to be admitted, the private debts of every individual contributory might be brought under the order.

*The LORD JUSTICE LORD CRANWORTH.*

I should be sorry if anything said by me extrajudicially, in *Lloyd's case*, should have admitted of such a construction as, I am now told, has been put upon it. In that case, if I remember rightly, the Master had declined to admit a claim as a debt, unless it were shown that the Company or some of the contributors were liable to it; but he admitted it as a claim. An application was made to me when Vice-Chancellor, to reverse what had been done by the Master, and to adopt the claim as a debt. I refused, and at the same time expressed a doubt whether the Master had gone too far in admitting it as a claim. I thought that, before admitting either a claim or a debt, it was necessary to show not only that there was a creditor, but also that there was a debtor. I ought, perhaps, to have gone on and said that the debtor must be shown to be the Association whose affairs were directed to be wound up under the order. The language attributed to me by the report of the case has led, we are told, to the inference that I also meant to say that the Master might adopt a claim against individuals forming part only of the Company, if they alone were the parties liable. If the language of the report bears that construction, it is to be regretted.

intended to decide or say was, that the claim not be admitted as a proof, and that I doubted if it ought to be admitted as a claim until it had been shown that the parties sought to be charged were jointly liable to the demand.

1852.  
WRYGHT'S  
CASE.

order now to be made will be that the appeal be dismissed with costs, but without prejudice to application which may be made to the Master to set aside the debt against the Company or Association and to be wound up.

MILES v. DURNFORD.

July 2.

It was on appeal from the decision of Vice-Chancellor Kindersley, reported 2 Simons (New Series), where the facts are stated.

Before The  
LORDS JUSTICES.

A suit was instituted by an executor to set aside a mortgage of a portion of the assets of the testator, made by a Mr. Punter, jun., his executor. The executor had died and the Plaintiff had taken out administration to him. The ground on which the mortgage was sought to be set aside was, that it had been made by the Plaintiff's co-executor, to secure a debt which had been originally contracted upon his personal security. But the only evidence in support of the mortgage was the recital in the deed, that on the death of Mr. Punter, jun., the mortgagee had

The survivor of two executors, who had taken out administration to the other, filed a bill to set aside a mortgage of part of the assets made by the deceased executor as having been a breach of trust.

Held, that his having taken out the administration did not disqualify

advanced him from maintaining the suit.

Not enough to impeach a mortgage of part of the assets, that it was made to secure a debt originally contracted on the personal security of the executor, without reference to the assets.

1852.  
 MILES  
 v.  
 DURNFORD.

advanced to Mr. *Punter*, jun., sums amounting to 600*l.*, and that 350*l.* part thereof was advanced to enable Mr. *Punter*, jun., as executor, to pay off a mortgage debt charged upon three leasehold houses, part of the testator's estate, and other charges incurred by Mr. *Punter*, jun., as executor. The mortgage was for 370*l.*, which was recited to be due for principal and interest in respect of the 350*l.*

The Vice-Chancellor dismissed the bill on the ground that the Plaintiff having taken upon himself the administration of the estate of his co-executor, by whom the transaction sought to be impeached was entered into, sustained two inconsistent characters, one of which excluded his right to sue.

On the appeal being opened, their Lordships desired to hear the question of pleading argued separately.

Mr. *Stuart* and Mr. *Nalder*, for the Plaintiff.

There being only one Plaintiff, the objection on the ground of misjoinder is self-contradictory.

They cited *Griffith v. Vanheythuyssen* (a).

Mr. *Giffard*, for the Defendant, submitted that by taking upon himself to administer to the executor alleged to have committed the breach of trust, the Plaintiff had disqualified himself from suing upon it.

*The LORD JUSTICE KNIGHT BRUCE.*

The case is this. One of two executors, being the acting executor, committed, as it is alleged, a breach of trust with respect to the general personal estate, and having done

(a) 9 *Hare*, 85.

so died, and the surviving executor of the testator, cent of participation in the breach of trust, made self administrator of the executor who committed it. of opinion that it is competent for him to file a bill ave the transaction, said to be a breach of trust, set

1852.  
MILES  
v.  
DURNFORD.

*The* LORD JUSTICE LORD CRANWORTH concurred.

*Nalder* then contended upon the merits, that the recitals of the mortgage deed it appeared that advances, the repayment of which the mortgage made to secure, had been made to the deceased tor without reference to his representative character, hat therefore a case at all events for inquiry was out.

*The* LORD JUSTICE KNIGHT BRUCE.

the evidence the security is not in any manner ached. Assuming that all the evidence that can has been, adduced, the question is, whether this tes such a case of suspicion as that further inquiry uld be directed or allowed. I am of opinion that proposition cannot be maintained. The only evi- ce is, that the advances were originally made without urity, and that the security was afterwards added. it is a circumstance deserving attention, but it s not go far. It is not inconsistent with proba- y that the advances were made for a purpose for ch the executor might properly borrow as executor. ink that the presumption is in favour of the pro- ty of the transaction, and that the Plaintiff wholly s.

*The* LORD JUSTICE LORD CRANWORTH concurred.

1852.

July 5.

HORLOCK v. HORLOCK.

Before *The*  
LORDS JUSTICES.

THIS was an appeal from a decision of the Master of the Rolls, upon a claim.

By an antenuptial settlement a fund was declared to be held by the trustees upon trust for the intended wife for life, for her separate use, without power of anticipation, and after her death in trust for the intended husband for life, and after the decease of the survivor, in trust for the children of

By a settlement dated the 8th of *April* 1826, made previously to, and in contemplation of a marriage which was afterwards solemnized between *Isaac John Horlock* and *Phæbe Boode*, after reciting amongst other things that in pursuance of an agreement made in contemplation of the marriage, *Andrew Christian Boode*, the father of the bride, had transferred the sum of 30,000*l.* 3*l.* per Cent. Consolidated Bank Annuities into the names of the trustees of the settlement, it was declared that the trustees, their executors, administrators, and assigns should stand and be possessed of and interested in the trust funds, upon trust after the marriage, and during the life of the intended wife, whether she should be under coverture or not, to pay the interest, dividends, and

the marriage as the intended husband and wife should jointly appoint, and (subject thereto and to a separate power of appointment in the survivor) in trust for the children equally, to be vested in sons at twenty-one and in daughters at twenty-one or marriage. There was also a power for the trustees, at the request of the husband and wife, during their joint lives, to advance, for the benefit of any child whose portion should not be vested, any part of his or her presumptive portion, and to apply for or towards the maintenance or education of any such child or children all or any part of the income of such his or her presumptive portions. The only children of the marriage were two sons and a daughter. The husband and wife appointed the trust fund to the three children equally, to be vested in sons at twenty-one and in the daughter at twenty-one or marriage, with trusts for accruer in the event of any child dying before attaining a vested interest. By the same deed the husband and wife requested the trustees to pay for five years after the date of the deed certain sums for the maintenance of the three children, and after the expiration of that period, to pay 150*l.* towards the maintenance and education of the children during the residue of the life of the wife. *Held*, that the maintenance clause did not enable the wife to affect her life interest by such a prospective provision, at all events as regarded any period beyond the minority of the sons, or the minority or marriage of the daughter.

1852.

*HORLOCK*  
v.  
*HORLOCK.*

annual produce of the trust funds, when and as the same should be received, unto such person or persons, and for such ends, intents, and purposes, as *Phæbe Boode*, notwithstanding her intended or other future coverture, and as if she were sole and unmarried, should from time to time by any note or writing signed by her own hand, (so as such note or writing should not be in the way of anticipation,) direct or appoint, and in default of such direction or appointment, should pay the same into the proper hands of *Phæbe Boode*, as her own sole and separate estate, free from the debts, control, or engagements or interference of her then intended or any future husband; and from and immediately after the decease of *Phæbe Boode*, if the said *Isaac John Horlock* should survive her, upon trust, during the life of *Isaac John Horlock*, to pay the interest, dividends, and annual produce of the trust-monies, stocks, funds, and securities to *Isaac John Horlock* and his assigns; and after the decease of the survivor of the said *Phæbe Boode* and *Isaac John Horlock*, upon trust to stand possessed of the trust fund, in trust for all and every of such one or more exclusively of the other or others of the child or children of the marriage, as *Isaac John Horlock* and *Phæbe Boode* should appoint; and subject to such joint direction or appointment as the survivor should appoint, and subject to such appointment, in trust for all and every the children and child of *Phæbe Boode* by *Isaac John Horlock*, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, and their respective executors, administrators and assigns, and to be divided between or among them, if more than one, in equal shares; and if there should be but one such child, in trust for such one child, his or her executors, administrators, or assigns. And it was thereby agreed and declared, that it should be lawful for the trustees and the survivors and survivor of



1852.  
 {  
 HORLOCK  
 v.  
 HORLOCK.


of them, his executors, administrators, and assigns, after the decease of *Phæbe Boode* and *Isaac John Horlock*, or in the lifetime of them or the survivor of them, at their, his, or her request in writing, to advance, pay, or apply for the placing out in the world, preferment or otherwise for the benefit of any child or children of *Phæbe Boode* by *Isaac John Horlock*, whose portion should not then be vested, all or any part of his, her, or their presumptive portion or portions, under the trusts therein before expressed and contained, and to apply for or towards the maintenance of or education of any such child or children, all or any part of the interest, dividends, and annual produce of such his, her, or their then presumptive portion or portions.

There were only three children of the marriage, *Anne Phæbe Horlock*, who was born in *August* 1827, *Frederick Geldart Webb Horlock*, who was born in *June* 1828, and another child named *Knightley Lionel Horlock*, who died an infant on the 29th of *December* 1834.

On the 12th of *February* 1834, *Isaac John Horlock* exhibited a libel in the Consistory Court of *London* against *Phæbe* his wife, and on the 16th of *May* in the same year, obtained a definitive sentence of divorce.

By an indenture dated the 21st of *June* 1834, and made between *Isaac John Horlock* of the first part, *Phæbe Horlock* of the second part, and *John Backhouse* the younger, the Defendant *Knightley William Horlock* and *Joseph Blunt* of the third part, after reciting the settlement, and that a bill was then in progress in Parliament for dissolving the marriage of *Isaac John Horlock* and *Phæbe* his wife, *Isaac John Horlock* assigned unto *John Backhouse* the younger, *Knightley William Horlock*, and *Joseph Blunt*, their executors, administrators,

administrators, and assigns, all the interest, dividends, annual produce to which *Isaac John Horlock* be entitled under the settlement for his life, in he should survive *Phæbe Horlock* in respect of sum of 30,000*l.* 3*l.* per Cent. Consolidated Bank Annuities, to the intent that the life interest of *Isaac Horlock* in the dividends, interest, and annual produce of the trust fund might be extinguished for the benefit of the parties or party who should or might be entitled to the Bank Annuities, funds, and premises in remainder expectant upon the decease of the one or of them the said *Isaac John Horlock* and *Phæbe* his wife. And that the rights and interest of such person or party in the Bank Annuities, funds, and premises might be accelerated, and that he or she might be entitled upon the decease of *Phæbe Horlock*, in the same manner as if *Isaac John Horlock* should lead. The deed further witnessed, that in pursuance and further performance of the agreement and intention of the natural love and affection which they had *Isaac John Horlock* and *Phæbe* his wife had for their children, and in pursuance and execution of the power or authority to them *Isaac John Horlock* and his wife in that behalf given and reserved by the deed, they appointed that from and immediately after the decease of *Phæbe Horlock* the sum of 30,000*l.*, the stocks, funds, or securities in or upon which the same should be invested should remain and be divided amongst *Frederick Geldart Webb Horlock*, *Knightley Webb Horlock*, and *Anna Phæbe Horlock*, to be divided equally between or among them in equal shares and proportions as tenants in common, and not as joint tenants; the said *Frederick Geldart Webb Horlock* and *Knightley Webb Horlock* to be vested interests in them respectively, at their respective ages of twenty-one years, and the share of *Anna Phæbe Horlock* to be a vested interest in

1852.  
  
 HORLOCK  
 v.  
 HORLOCK.


1852.  
 HORLOCK  
 v.  
 HORLOCK.

in her at her age of twenty-one years or day of marriage which should first happen, and to be payable and paid to them the said three children, as soon after the respective ages or day should be attained; and also after the death of *Phæbe Horlock*, in case of the ages or day happening in her lifetime, as conveniently might be. And in case any one or more of the said *Frederick Geldart Webb Horlock*, *Knightley Lionel Horlock*, and *Anna Phæbe Horlock*, being *Frederick G. W. Horlock*, or *Knightley Lionel Horlock* should die under the age of twenty-one years, or being *Anna Phæbe Horlock*, should die under that age, and also before she should have been married then as to the original share or shares of the trust fund which under the appointment thereinbefore contained should belong to such of them the said *Frederick Geldart Webb Horlock*, *Knightley Lionel Horlock*, and *Anna Phæbe Horlock* so dying as aforesaid and also that part or share of the trust-moneys, stocks, funds, and securities which should belong to or be taken by the same child or children so dying respectively as aforesaid under the notwithstanding proviso, and all the accumulations and savings if any, of the interest, dividends, and income of the shares or shares of such child or children respectively so dying in trust for the other, and if more than one the others, of them, to be equally divided between the same children if more than one, share and share alike, as tenants in common, and not as joint tenants, and his, her, or their executors, administrators, and assigns to be vested at the ages, day, or time thereinbefore appointed respecting the original share or shares of the same child or children, and to be payable and paid at the time, and several respective times appointed for the payment of the original share or shares, or as soon after as conveniently might be. By a further witnessing part of the deed *Isaac John Horlock* and *Phæbe* his wife requested and

and directed the then trustees of the settlement, and the survivors and survivor of them, and the trustees or trustee for the time being of the settlement from time to time, during the term of five years to be computed from the date of the now stating deed, if *Phæbe Horlock* should so long live, and if either of them the said *Frederick Geldart Webb Horlock*, *Knightley Lionel Horlock*, and *Anna Phæbe Horlock* should die during the term of five years, then during the residue of the life of *Phæbe Horlock*, by and out of the dividends, interest, and annual proceeds of the stocks, funds, or securities to pay and apply the annual sum of 100*l.* for and towards the maintenance and education of the said *Frederick Geldart Webb Horlock*, *Knightley Lionel Horlock*, and *Anna Phæbe Horlock*, or such of them as should be for the time being living, but if all of them should be living at the expiration of the term of five years, then and thenceforth by and out of the dividends, interest, and annual proceeds to pay and apply for and towards their maintenance and education the annual sum of 150*l.* during the residue of the life of *Phæbe Horlock*, until some one or more of the said *Frederick Geldart Webb Horlock*, *Knightley Lionel Horlock*, and *Anna Phæbe Horlock*, should die. And from and after the decease of any or either of them after the expiration of a term of five years, then during the residue of the life of *Phæbe Horlock*, by and out of the dividends, interest, and annual proceeds to pay and apply the yearly sum of 100*l.* for or towards the maintenance and education of the survivors or survivor of them the said *Frederick Geldart Webb Horlock*, *Knightley Lionel Horlock*, and *Anna Phæbe Horlock*.

The divorce bill mentioned in the recitals of the deed of 1834, passed on the 25th of *June* in that year.

In

1852.  
  
 HORLOCK  
 v.  
 HORLOCK.

1852.  
 HORLOCK  
 v.  
 HORLOCK.

In the latter part of the year 1834, *Phæbe Horlock* intermarried with *Baker Dawson*.

By an indenture dated the 6th of *February* 1849, *Isaac John Horlock* and *Phæbe Dawson*, in execution of a power in the settlement, appointed two new trustees in the place of two of the trustees originally appointed. This deed recited the deed of 1834, and in the declaration of trust it was declared that the trustees should hold the fund upon the trusts declared by the settlement and by the deed of 1834.

From the appointment of new trustees until the 5th of *January* 1851, the income of the trust funds had been paid to Mrs. *Dawson*.

From the statement already made it will have been collected that *Frederick Geldart Webb Horlock* attained twenty-one in 1849. *Anna Phæbe Horlock* married in 1845 *Joseph James Ernest Ely* one of the Defendants.

*Frederick Geldart Webb Horlock* filed the claim in the present suit claiming to be entitled to receive the sum of 50*l.* per annum out of the dividends of the trust funds from the 21st of *June* 1834, during the remainder of the life of *Phæbe Dawson*, and an order was made in substance according to the claim.

Mr. *Glasse* and Mr. *Hobhouse*, for the Plaintiffs, contended that the appointment made by the deed of 1834 for the maintenance of the Plaintiffs was substantially a good execution of the power conferred upon them by the maintenance clause in the settlement. They cited *Longmore v. Elcum* (a), *Soames v. Martin* (b).

Mr. *Elmsley* and Mr. *Mackenzie*, for Mr. and Mrs. *Ely*, also supported the order.

Mr.

(a) 2 Y. & C. C. C. 363.

(b) 10 Sim. 287.

r. *Russell* and Mr. *Kenyon*, for the Appellants, were called upon.

1852.

HORLOCK

v.

HORLOCK.

*The* LORD JUSTICE KNIGHT BRUCE.

It is plain that the restraint upon anticipation, imposed by the settlement upon Mrs. *Horlock*, was not affected by the divorce *à mensâ et thoro*, or by the provisions of the divorce bill at the time of the execution of the deed of 1834, that deed having been executed before the bill received the royal assent. The question is as to the construction of the maintenance clause, contained in the same division or set of paragraphs as the advancement clause. I am of opinion that, according to the true construction of the former clause, whether compared or not compared with the rest of the instrument, it did not enable this lady to affect her life interest by a prospective provision for the maintenance of her children, or any one or more of them, at least until the majority of a son or the majority or marriage of a daughter. I give no opinion whether she could have affected her life interest by such a provision for a son or daughter, until the majority of the son or the majority or marriage of the daughter. That question does not arise, the only dispute being as to the effect of the deed after the majority of the only son who has attained twenty-one, and the marriage of an only daughter. I think that the lady was under an actual disability to affect her life estate, although I regret the necessity of deciding.

*The* LORD JUSTICE LORD CRANWORTH concurred.

The appeal was allowed, and the claim dismissed without costs.

1852.

July 10.

## WRIGHT v. CALLENDER.

Before *The*  
LORDS JUSTICES.

A testator directed his executors to stand possessed of his personal estate, upon trust to invest a sufficient portion thereof in the funds to produce an annuity of 2*l.* per week, to be paid to one of his sons, and that after his son's decease the sum to be so invested should fall into the residue. He directed his executors, as soon as his youngest child should attain twenty-one, to divide his remaining estate amongst

all his children, except the annuitant, equally, and directed that, upon the decease of the annuitant, the sum invested to produce his annuity should be divided in like manner among all the testator's other children who should then be living and the issue of such as should be dead, share and share alike. The income of the residuary estate was insufficient to pay the annuity. *Held*, that the annuitant was entitled to have the deficiency made up out of the capital, but not to have the annuity valued and the amount of the valuation paid to him.

THIS was an appeal from the decision of Vice-Chancellor *Kindersley*, upon the construction of the will of *William Wright*, dated the 8th of *July* 1851, whereby the testator, after bequeathing a legacy of 100*l.* and directing his executors to pay his debts, and funeral and testamentary expenses out of his personal estate, directed them to get in such personal estate, and to stand possessed thereof, upon trust to invest a sufficient portion thereof in the public funds of *Great Britain*, or upon other Government securities, to produce an income of 2*l.* a week, to be paid by his executors to his son *James Wright*, during the term of his natural life, to and for his own use and benefit, for his support and maintenance, the said annuity to be in bar and satisfaction of all claim, right, or title to the testator's real and personal estate, or any part thereof, and from and after the decease of his said son *James*, the said sum so invested was to fall into and become part of the residue of the testator's said personal estate. And after certain devises and bequests to the testator's other children *Thomas, Isaac, Rebecca, and Hannah*, the testator bequeathed his residuary estate as follows: "And when and as soon as the youngest of my said children shall attain that age, upon trust that my said executors do and shall pay and divide my said residuary estate, (all such parts of which as do not already

already consist of public stocks, funds, and securities, I direct may in the meantime be invested in the public funds or other Government securities,) after deducting the several payments aforesaid, and all due allowances to my said executors, unto and amongst all and every my said children, except my said son *James Wright*, share and share alike, to and for their own absolute use and benefit. And in like manner I direct, that upon the decease of my said son *James*, the sum to be invested to produce and pay his annuity of 2*l.* a week, shall be divided unto and amongst all my other children who shall be then living, or the issue of such of them as may be dead, share and share alike."

1852.  
WRIGHT  
v.  
CALLENDER.

The testator died on the 20th of *July* 1841, and the executors invested the testator's residuary personal estate in the purchase of 2200*l.* 17*s.* 6*d.* 3*l.* per Cent. Consols, and applied the dividends thereof in payment of the annuity of 2*l.* per week, given to the testator's son *James*, until *January* 1852, making up the deficiency of the dividends for the payment of the annuity out of the capital of the fund. After *January* 1852, entertaining some doubts as to the propriety of so applying the capital of the fund, they declined to make any further payment, except to the extent of the dividends of the 2200*l.* 17*s.* 6*d.* The present suit was then instituted by the testator's son *James*, by way of claim, seeking to have a sufficient sum set apart out of the personal estate of the testator, and invested in the public funds or upon Government securities, pursuant to the terms of the will, or otherwise to have the annuity valued, and the sum at which the same should be valued paid to the annuitant out of the testator's personal estate.

The Vice-Chancellor decided that the annuitant was entitled to be paid only the annual dividends of the funds



1852.  
 WRIGHT  
 v.  
 CALLENDER.

funds arising from the investment of the testator's residuary personal estate.

Mr. *Malins* and Mr. *Drewry*, in support of the appeal.

The Vice-Chancellor considered this case distinguishable from *May v. Bennett* (a), in the circumstance of a fund being here given to secure the annuity, with a limitation of the fund over after the annuitant's death, upon trusts differing from those declared of the residue. We submit that there is no substantial difference between the cases, and that the language of the will shows that the limitations of the fund and of the residue were not intended or considered by the testator to be substantially different. The case is really the same as one where an annuity is simply bequeathed; in which case the annuity must be made up in full before the residuary legatee can take anything: *Gordon v. Borden* (b), *Davies v. Wattier* (c). The proper course would be to set a value upon the annuity, and pay the amount at which it may be valued to the Plaintiff at once: *Wroughton v. Colquhoun* (d), and the cases there cited.

They also cited *Ex parte Wilkinson* (e).

Mr. *Stuart* and Mr. *Shebbeare*, for the Executors.

This is not a bequest of an annuity, but a direction to set apart a fund and pay the income to the Plaintiff, and the capital after his death to others. It is one gift, and the tenant for life has no preference over those entitled in remainder.

*The LORD JUSTICE LORD CRANWORTH.*

I cannot but feel doubtful when expressing an opinion on differing


- (a) 1 *Russ.* 370.
- (b) 6 *Mad.* 342.
- (c) 1 *S. & S.* 463.

- (d) 1 *De G. & S.* 36, 357.
- (e) 3 *De G. & S.* 633.

fering from that of Vice-Chancellor *Kindersley*, but it not to be wondered at that different minds should give at different conclusions upon the construction of a will so obscurely worded as this is. The view which I take is this. By the will the testator has in effect given an annuity of 104*l.* per annum to his son *James*, and has directed that the annuity should be secured by means of a fund to be set apart, out of which it should be paid. The testator at his death did not leave sufficient assets to raise a fund out of the dividends of which the full annuity could be paid. The question is, what is to be done under the circumstances? It has hardly been attempted to be controverted, that if the fund had merely been directed to fall into the residue, the annuitant would be entitled to the annuity in full. The Vice-Chancellor, however, has proceeded upon this distinction, that according to the true construction of the will, the fund to be appropriated to secure the annuity, though directed by the will to fall into the residue of the testator's estate, is by a subsequent clause of the will given to a different class of persons from those who are to have the residue.

1852.  
WRIGHT  
v.  
CALLENDER.

Whether that is the proper construction to be put upon the will, I do not think it material to decide. I am disposed, however, to think that it is. But what then? The testator intended 104*l.* a year to be paid to *James*, and gives him that annuity. How is the case varied by his saying that after the death of the annuitant the fund set apart to answer the annuity is given over? If there had been anything in the terms of that gift over, showing that the testator intended the fund to be continued in its integrity during the life of the annuitant, and in that state to go over, the argument might be well founded. But the direction to set apart the fund does not denote the object of the testator, but

1852.  
  
 WRIGHT  
 v.  
 CALLENDER.

merely the means by which that object was to be secured. I do not see any substantial distinction between this case and *May v. Bennett*. There, as in the case before the Court, the question arose between the annuitant and the residuary legatee. The testator in that case having directed his executors to lay out in what government security they pleased, as much money as would produce 5*l.* 12*s.* per year, and having given that annual interest to his wife during her life in case she did not marry again, the executors invested in the 5*l.* per Cents. a sum which yielded dividends exactly equal to the specified income. Eighteen years afterwards those dividends were diminished by the conversion of the 5*l.* per Cents. into 4*l.* per Cents., and became therefore insufficient to meet the annuity. Lord *Gifford* held that the setting apart the fund was only means to the end, and that if that means failed the intention was that the actual amount of the annuity should be made up out of the other assets. What Lord *Gifford* said was this: "If there is any difficulty in making good the difference out of the general estate of the testator, she must have the deficiency raised from time to time by the sale of parts of the appropriate stock." Now, that is, in my opinion, the equity and the only equity which the annuitant has. For I see no principle in saying that where the question is between the annuitant and those entitled to the residuary estate the annuitant is entitled to have the annuity valued and to be paid the amount of the valuation in respect of his annuity. In all the cases which have been cited in support of that view, the question has arisen between the annuitant and pecuniary legatees, and not between the annuitant and the residuary legatee. But as between an annuitant and pecuniary legatees the Court hold that there must be an abatement *pari passu* in case of deficiency of assets, and knows of no other way of dealing

ing

ing with the subject, or of making the requisite abatement than by means of a valuation. No such question arises here, where all that can be asked is payment of the annuity, and an investment of the fund by way of security, and in the event of the dividends of that fund being insufficient to meet the annual payments in respect of the annuity, then to have the deficiency made good from time to time, either by a sale of portions of the appropriated stock, or out of any other part of the residue which could be made available. It may happen certainly that by this means the whole appropriated fund would in the end be exhausted if the annuitant lived long enough. In that case the annuitant would be in the situation of any other person to whom a testator bequeaths a benefit without leaving assets to provide for it.

1852.  
WRIGHT  
v.  
CALLENDER.

*The LORD JUSTICE KNIGHT BRUCE.*

It is sufficient to show this to be a case of difficulty, that Lord *Cranworth* and Sir *Richard Kindersley* differ in their views of it. In electing between the two constructions that have been put upon the language of the will before us, my conclusion is in conformity with the judgment which has just been pronounced. The opinion formed by me when I first read the will has continued unchanged during the argument; it is that the Plaintiff is entitled to have the will read as if he had been named in it simply and merely as a legatee of an annuity of 2*l.* per week for life. I am<sup>c</sup> certainly not disposed at present to direct that the annuity should be valued, or to do more than allow the annuitant from time to time to break into the capital of the appropriated fund for the purpose of making good any deficiency in the dividends to pay his annuity. If the parties cannot agree upon the mode of raising the

1852.

WRIGHT

v.

CALLENDER.

the deficiency, the case may be again mentioned to the Court.

The case was not mentioned again.

June 29.  
July 1, 17.

## GLASS v. RICHARDSON.

Before The  
LORDS JUSTICES.

A testator devised copyholds to such uses as *A.* and *B.*, or the survivor of them, his executors or administrators should appoint, and subject thereto to the use of *A.* and *B.*, their heirs and assigns for ever upon certain trusts; and he directed his said trustees to sell the copyholds as soon as conveniently might be. *Held*, that the trustees could make a good title to a purchaser without being admitted.

THIS was an appeal from the decision of Vice-Chancellor *Turner*, reported in the ninth volume of *Mr. Hare's Reports*, page 698, in a suit instituted by vendors, by way of claim for specific performance of a contract to purchase certain copyhold hereditaments.

The Plaintiffs were trustees under the will of *Henry Bayford*, dated the 30th of *January* 1850, devising all his freehold and copyhold hereditaments to such uses as the Plaintiffs or the survivor of them, or the executors or administrators of such survivor, should by deed appoint, and subject thereto to the use of the Plaintiffs, their heirs and assigns for ever.

The will contained a direction, that the trustees should, as soon as conveniently might be, sell the devised hereditaments, and gave power for them to give valid discharges.

The Defendant declined to complete unless the Plaintiffs procured themselves to be admitted, and pending the discussions to which this objection led, the lord had seized *quousque*, and commenced an action of ejectment.

The Vice-Chancellor had decreed a specific performance.

Mr.

Mr. Rogers, for the Plaintiffs, cited *Rex v. Lord of Manor of Oundle* (a), *Boddington v. Abernethy* (b), *Coke's Law Tracts* (c), and *Holder v. Preston* (d).

1852.  
GLASS  
v.  
RICHARDSON.

Mr. Lee and Mr. Haddon, for the Defendant:—

The recent cases before the Court of Queen's Bench, relied upon by the vendors, do not establish the proposition for which they contend, even supposing those cases to have been correctly decided, as to which there is some doubt. In both of them the lord, by accepting the surrender, might be said to have assented to the abridgment of his right, which might be thereby occasioned. But to infer from these cases that the acceptance of a mere surrender, in the ordinary form, to the uses of the copyholder's will, authorizes the copyholder to make such a will, as that, under it, the fee simple may be shifted without admission or the payment of a fine, is to assume the whole question in dispute. The acceptance of a surrender to the use of the copyholder's will, is only an assent to the limitation of such uses as the ordinary custom of the manor authorizes; and therefore, if it gave validity to such a will as this, it must follow that the lord might be compelled to accept a surrender to the very uses which were here declared. But in *Regina v. Lord of Manor of Witchford* (which is not reported), a rule had been obtained in the Court of Queen's Bench, in Easter Term 1838, calling on the lord and the steward of the manor of *Witchford* to show cause why a *mandamus* should not issue commanding them to accept a surrender of a copyhold tenement to such uses, for such estates, and in such manner as *Robert Poole* should at any time, or from time to time, by any deed

(a) 1 A. & E. 283.  
(b) 5 B. & C. 776.

(c) Page 82 (*Hawkins' edit.*).  
(d) 2 Wils. 400.

1852.  
 GLASS  
 v.  
 RICHARDSON.

deed or deeds, or by his last will and testament ~~in~~  
 writing, to be executed and attested by one witness ~~or~~  
 more appoint, and in default of such appointment, to ~~the~~  
 use of the said *Robert Poole*, his heirs and assigns ~~as~~  
 for ever, according to the custom of the said manor ~~of~~.  
 On the case coming on for argument in *May* 1839 ~~and~~,  
 the rule was discharged; and it appears from a note ~~of~~  
 which we have of the argument, that the distinction ~~of~~  
 which we are now insisting between such a case and *Re* ~~the~~  
*v. Lord of the Manor of Oundle*, was relied upon (a).

They referred to *Scriven* on Copyholds (b), *Gilbert* on ~~Tenures~~  
*Tenures* (c), *Grove v. Bastard* (d).

Mr. *Rogers*, in reply, referred to *Reg. v. Steward* ~~of~~  
*Witchford*, as reported in the note in 1 Q. B. 355, ~~to~~  
 show that the *mandamus* there was ultimately granted ~~and~~  
 and that the rule was discharged upon the previous ~~occasion~~  
 occasion to which Mr. *Lee* referred, on grounds ~~not~~  
 affecting the present question.

*The* LORD JUSTICE KNIGHT BRUCE.

If the two trustees had sold shortly after the testa-  
 tor's death, and speedily exercised their actual or alleged  
 power or authority, by limiting the estate to the use of  
 the purchaser, or directing it to vest in him, it may be  
 that he would have been entitled to admission upon the  
 payment of a single fine, as if the devise had been at  
 once to him. But if that question ought to be answered  
 in the Plaintiffs' favour, there is still the question, whe-  
 ther

(a) The *mandamus* appears  
 to have been ultimately granted  
 (see 1 Q. B. 355, note), but the  
 point has since been decided in  
 favour of the lord in a similar  
 case: see *Flack v. Master and*

*Fellows of Downing College*,  
 17 Jur. 697.

(b) Page 175, 4th edit.

(c) Page 354, 5th edit.

(d) 2 *Phil.* 619; see also 1  
*De G. Mac. & G.* 69.

er the disputes which have taken place have not introduced important embarrassment and difficulty.

*Cur. adv. vult.*

1852.  
GLASS  
v.  
RICHARDSON.

July 17.

*The* LORD JUSTICE LORD CRANWORTH.

This was an appeal from a decretal order of Vice-chancellor *Turner*, made on a claim by the Plaintiffs. The order was, that the Defendant should specifically perform an agreement to purchase from the Plaintiffs a small copyhold estate, held of the manor of *Furneaux Pelham*, in the county of *Herts*.

The Plaintiffs are trustees for sale, named in the will of *Henry Bayford*, dated on the 30th of *January* 1850. The testator died very soon afterwards, his will having been duly proved on the 19th of *April* in the same year, 1850. On the 3rd of *June* 1851, the Plaintiffs put the property, which by the will was directed to be sold, up for sale by public auction, in three lots; and the Defendant, by a memorandum duly signed by him, agreed to become the purchaser of Lot 3, being the property in question, at the price of 60*l*. Immediately after the sale, the vendors delivered an abstract of their title to the lot in question, and it is admitted that they showed a good title, subject to the following objection.

The will of the testator, so far as it is material to state it, is as follows—[His Lordship read it.]

The Defendant contends that, under this devise, the Plaintiffs, as trustees for sale, cannot make a title without first causing themselves to be admitted, and then surrendering to him. The Plaintiffs, on the other hand, say, that they are, and always have been, ready and willing to execute to the Defendant, a bargain and sale of the property in question, and that the Defendant will thereby be entitled to compel the lord to admit him,



1852.  
 GLASS  
 v.  
 RICHARDSON.

him, and so that no admittance of the trustees is necessary. The Vice-Chancellor was clear in his opinion that the Plaintiffs were right, and so made a decretal order in their favour. We had the advantage of a full and apparently accurate note of what fell from him in giving his judgment, and I entirely concur in his view of the case.

A testator disposing of a copyhold by his will, does no more than name the person whom the lord shall admit, and whether he fixes on a person by name, or authorizes another to name him, who accordingly does name him, the result must be the same. This point was in fact decided in *Holder v. Preston* (a). It is true that in that case there was no gift to the trustees for sale, in default of and until appointment by them; but this, in my opinion, makes no difference so far as relates to the present question. There the bargain and sale when made defeated the title of the heir; here it will defeat the title of the devisees; but the governing principle is the same in both cases, namely, that the bargainee has title directly from the testator, is substantially his nominee or devisee, and so is entitled to call on the lord to admit him. It was contended that this was a hardship on the lord. But certainly that is not so. All that the lord can insist on is, that he shall never be without either a tenant or the possession of the land, and this is effectually secured to him by his right of seizing the land *quousque*, upon the death of the tenant, unless the heir, or some one claiming under the testator's will, comes in and is admitted.

In the present case the lord has exercised this right, but whatever difficulty is thereby occasioned to the Defendant is a difficulty caused by his own delay. The Plaintiffs showed a good title on or within a day or two after

(a) 2 Wils. 400.

er the 3rd of *June*, and it was not till the 28th of *tober* following that the lord seized. If the Defendant had, promptly after the title had been shown, presented and tendered to the Plaintiffs, for execution, a deed bargain and sale, it is obvious that on receiving the balance of the purchase-money, they would have executed it, and then the Defendant would have been in a position to compel the lord to perfect his title, by permitting him long before any steps had been taken towards a seizure *quousque*.

1852.  
GLASS  
v.  
RICHARDSON.

It was contended before us, that the decision of the Chancellor can only be supported by holding that the lord is bound on a sale by his tenant to accept a surrender, not to the use of the purchaser and his heirs in the usual way, but a surrender to such uses as the purchaser shall appoint, and for default of appointment, to himself and his heirs, following or nearly following the ordinary mode adopted in conveyances of freehold lands. And it was said in argument, that although, where such a surrender has been accepted, the lord may be compelled to admit the nominee or the appointee of the purchaser, as was decided in *Rex v. Lord of the Manor of Wandle* (a); yet that no case had gone the length of establishing that the lord was bound to accept such a surrender, and we were referred to the case of *Regina v. Fitzford* (b), and to a note of the argument there from the MS. of Mr. *Adolphus*. I desire to be understood as giving no opinion on the point, whether the lord would or would not be bound to accept such a surrender (c). It is sufficient to say, that no such question arises here. The point for decision is not what surrender the lord was bound to accept, but whether he is

|                                                          |                                    |
|----------------------------------------------------------|------------------------------------|
| (a) 1 <i>A. &amp; E.</i> 283.                            | mon Pleas in favour of the         |
| (b) 1 <i>Q. B.</i> 355, <i>note</i> .                    | lord: <i>Flack v. Master and</i>   |
| (c) This point has now been decided by the Court of Com- | <i>Fellows of Downing College,</i> |
|                                                          | 17 <i>Jur.</i> 697.                |

1852.  
GLASS  
v.  
RICHARDSON.

is not bound to admit the bargainee of the trustees, as being in truth the nominee of the devisor. I concur with the Vice-Chancellor in thinking that he was, and that the case being one admitting of no reasonable doubt, the order compelling the Defendant to complete his purchase was perfectly right, and so that the present appeal ought to be dismissed.

*The LORD JUSTICE KNIGHT BRUCE.*

The necessary result of Lord *Cranworth's* opinion is the affirmance of the Vice-Chancellor's order or decree, whatever my opinion may be. I confess that I entertain some doubt, and am not quite satisfied that if the case had come before me, as it did before Sir *George Turner*, in the first instance, I should have dealt with it as that able judge did.

His Lordship then adverted to the particular circumstances of the case, which, his Lordship said, led him to doubt whether the Defendant was not entitled, either without any terms being imposed upon him, or upon certain terms which his Lordship indicated, to have the claim dismissed without costs, without prejudice to an action, and without prejudice to any question. But his Lordship concluded by intimating his impression, that good sense and moral justice were in favour of what had been judicially done in the case, independently of the likelihood that the united opinion of Sir *George Turner* and Lord *Cranworth* was right in point of technical justice.

Appeal dismissed with costs (a).

(a) See *Eddlestone v. Collins*, and *Edwards v. Champion*, *post*, Vol. 3.

1852.

In the Matter of THE DIRECT EXETER, PLYMOUTH, AND DEVONPORT RAILWAY COMPANY;

July 20, 26.

AND

In the Matter of the JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848.

EX PARTE WOOLMER AND OTHERS.

**T**HIS was an appeal from the decision of the Vice-Chancellor *Parker*, reported in the 5th volume of *De Gex & Smale's Reports*, page 117, and it came on to be heard, by arrangement, at the same time with an appeal directly from a decision of the Master, making a call upon the Appellants.

Before *The*  
LORDS JUSTICES.

A director of an abortive provisionally registered railway Company presented a petition to have it wound up, and obtained the usual order, with the concurrence or without opposition from the other directors, who were themselves prepared and who intended to take the same step if the petitioner did not.

By the order of the Vice-Chancellor under appeal, his Honor dismissed the petition of the Appellants seeking to discharge an order made in *June* 1849, for winding up the Company. The circumstances with reference to this petition are fully set out in the report of the case in the Court below.

By the other order appealed from, the Master had made a call upon each of the seven only contributories upon the list to raise a sum of 3019*l.* 4*s.*, whereof 86*l.* 3*s.* was due in respect of the only debt claimed against the Company,

Two years afterwards, and after large expenses had been incurred in unsuccessfully attempting to retain other persons upon the list of contributories, four of the other directors sought to discharge the winding-up order.

*Held*, that they could not be heard to allege that the order had been wrongly obtained.

*Held* also, that they were liable to contribute to the costs incurred under the winding-up order, and that a call had been properly and not prematurely made for that purpose, although there had been no adverse taxation of the costs.

In making a call for the costs of winding up, it is a legitimate course to apportion the amount according to the number of shares.

1852.  
*Ex parte*  
 WOOLMER.

Company, and the remainder in respect of the costs ~~and~~ expenses incurred by the official manager in winding ~~up~~ the Company under the Acts. These costs had been taxed by one of the Taxing Masters at the request of ~~the~~ Master.

The four directors, whose petitions had been dismissed, were the Appellants from both the orders.

Mr. *Bacon* and Mr. *T. H. Terrell* were for the Appellants.

Sir *W. P. Wood* and Mr. *Roxburgh*, for the Official Manager.

Mr. *Malins* and Mr. *Daniel*, for Colonel *Ellis*, one of the directors.

*The LORD JUSTICE LORD CRANWORTH.*

This case comes before us upon two proceedings : first, upon a petition by four out of seven gentlemen, who constitute the list of contributories as ultimately established in the Master's office, to discharge the winding-up order; and, secondly, upon a motion by those same gentlemen to discharge an order of the Master, which was made for a call to raise a sum of 3019*l.* 4*s.*

We have already, in the progress of the arguments, intimated our opinion that the first application,—I mean, the application by the petition to discharge the winding-up order, which the Vice-Chancellor *Parker* had refused to discharge,—was one which ought not to be acceded to. The ground on which we came to this conclusion was, that the winding-up order, whether rightly or wrongly obtained, was an order obtained practically as much by the present Petitioners as by Colonel *Ellis*. They, as well as he, proposed to take what they thought, and perhaps rightly thought, was a  
 fit

fit and expedient course. While they were proceeding in that course Colonel *Ellis* was the first to obtain the winding-up order. It was prosecuted by him, but evidently with the sanction and concurrence of these Petitioners, who took as much part in the proceeding as he did. We are clearly of opinion that they could not say that Colonel *Ellis* had done wrong in obtaining the order. If he had not done it, or if he had been a week later, they would have got the order themselves. We think the Vice-Chancellor was right in refusing the petition, and consequently that the appeal from his decision must be dismissed with costs.

1852.

*Ex parte*  
WOOLMER.

With regard to the motion to discharge the order for the call, the matter stands thus:—The great object of the parties obtaining the order—(I say the parties, because I consider the gentlemen who are now trying to discharge the order as much applicants for the order as Colonel *Ellis* himself was)—was to fix the liability to the expenses of this Company, not upon the managing committee only,—the seven who were eventually constituted the only contributories,—but to throw that liability over a much wider surface, to include amongst the contributories either the whole body of the provisional committeemen, or certain of the provisional committeemen, who were supposed to have rendered themselves more liable than the general body, and, in short, to disperse among thirty or forty the liabilities which have been eventually thrown upon the seven. For that purpose they endeavoured to place upon the list of contributories a great number of other persons. They succeeded in doing so as far as the Master's office was concerned; but those persons from time to time appealed against the decision of the Master, and successfully appealed; so that, instead of the thirty or forty who were originally put on the list, the number was reduced

1852.

*Ex parte*  
WOOLMER.

duced to the seven who constituted the managing committee. The result of all these appeals was that very heavy costs were incurred, — costs that practically amount to the whole of the sum now sought to be recovered. It turns out, therefore, that the attempt to wind up the affairs of the Company, and to diffuse the liability among other persons besides the seven eventually found to be liable, has occasioned the costs, which the Master estimates at 3019*l.* 4*s.* It is said that there has never been any taxation, properly so called, at which the persons interested in reducing the amount of the bill have been heard. The bill has, however, been in a sense taxed. The Master has had it laid before an officer competent to exercise a judgment upon it, and that officer, one of the Taxing Masters, has reduced it to an amount that leaves 3019*l.* 4*s.* due for the whole demand. The Master thinks it proper that this amount should be raised, and we both concur in thinking that a very reasonable conclusion.

It is true that this is a sum for which the parties that will be liable to pay it have in one sense had no value, that is, they get nothing; but, as was observed, that is what may be said of any person who, having unsuccessfully resisted a demand, has to pay large costs. In one sense he gets nothing, because he was wrong, yet he got a *locum standi* to contest the point whether he was right or wrong. If his views of the law had been right, he would have got a great benefit. Who is to pay? Why, the persons who have caused the expense. They have been endeavouring to satisfy the Court that they were not the only contributories, but that others were liable with them, and they endeavoured to reduce the sum to a very small amount. They failed in doing so, and for their attempt they must pay.

If

1852.

*Ex parte*  
WOOLMER.

was a reasonable and proper course to be taken, ~~and~~  
that the motion must be dismissed with costs.

The LORD JUSTICE KNIGHT BRUCE concurred.

July 22.

ATKINSON v. GYLBY.

Before The  
LORDS JUSTICES.

An insurance Company lent money on the security of a bond given by three obligors to two of the directors and of a policy effected with the Company by one of the obligors on his own life, and deposited as a collateral security. By the terms of the policy the insurance money was charged on funds and property of the Company only.

THIS was an appeal from a decision of Vice-Chancellor *Kindersley*, allowing exceptions to the Master's report, under a decree in a suit instituted by one on behalf of all the creditors of a testator named *Joh Parker Gylby*, for the administration of his estate.


The subject of the exceptions was a claim carried in before the Master, by the trustees and directors of the *Britannia Life Assurance Company*, who claimed as bond creditors of the testator, under two bonds dated the 7th of *February* 1842, and the 19th of *December* 1842, in which the testator had joined as surety for one *William Edwards*.

By the former of these bonds, *William Edwards* and the testator with another co-obligor became jointly and severally bound to *David Salomons* and *H. M. Kemshead*.

two The condition of the bond was for payment of the money lent with interest, and of the premiums upon the policy. The insurance Company was dissolved, their funds distributed, and their business transferred to another Company, to whom the obligees assigned the bond. One of the obligors who had not effected the insurance having died, and the policy having become forfeited for nonpayment of the premiums, the assignees of the bond debt sought to prove in the Master's office under a decree for the administration of the estate of the deceased obligor. *Held*, that the proof ought to be admitted to the extent of an unpaid premium, which became payable before the dissolution of the Company, although the dissolution took place long before the end of the year for which the premium was paid; but that no proof could be admitted for any premium the time for payment of which had not arrived when the Company was dissolved.



of the directors of the *London and Westminster Mutual Life Assurance Society*, in the penal sum of 1000*l.* The condition of the bond recited that *W. Edwards* having occasion for the sum of 450*l.*, had requested the said *David Salomons* and *H. M. Kemshead* to lend him the same, which they had agreed to do upon having repayment of the said sum, in manner therein mentioned, and interest thereon, secured by the bond; and it provided, that the bond should be void upon payment by the said *W. Edwards*, his heirs, executors, or administrators, unto the said *D. Salomons* and *H. M. Kemshead*, their executors, administrators, or assigns, of the sum of 450*l.*, in the proportions and at the times therein mentioned, with interest thereon at the rate of 5*l.* per cent. per annum. And also should, so long as any money remained due on the security of the bond, well and truly pay, or cause to be paid, the several annual premiums payable in respect of two several policies of assurance mentioned in the condition, and all other payments whatsoever that should be requisite or necessary for keeping the same on foot; and should not, during such time as aforesaid, do any act whatsoever whereby the two several policies might be liable to be forfeited.

1852.  
  
 ATKINSON  
 v.  
 GYLBY.

One of the policies referred to in the above condition was dated the 13th of *July* 1841, and under the hands of three of the directors of the *London and Westminster Mutual Life Assurance Society*, and was numbered 131. By it the capital, and funds or property of the Society, were declared to be subject and liable, according to the provisions of the deed of settlement, to pay the sum of 1000*l.* to the executors, administrators, or assigns of *William Edwards*, if he should die before or upon the 1st of *July* 1852, or if he should live beyond that day, and he, or his assigns, should pay, or

and up, and the Society was dissolved and  
 exist, (its business being transferred to the  
 Life Assurance Company,) and since the  
*October* 1844, there had been no directors of  
 y, nor had the Society since that time had any  
 the transaction of business ; and the capital,  
 l property of the Society were shortly after-  
 ributed amongst the shareholders and mem-  
 ding to their shares and interests.

indenture of assignment, dated the 13th of  
 1844, Messrs. *Salomons* and *Kemshead*, as  
 es of the *London* and *Westminster* Assurance  
 ssigned to several persons therein named, as  
 nd directors of the *Britannia* Life Assurance  
 (among other things), the above-mentioned  
 the principal and other sums secured thereby,  
 erest due or to become due in respect of the  
 or any of them, and the said several policies  
 ce, subject nevertheless as to such policies of  
 to such rights of equity of redemption as were  
 isting thereof. The premiums which became  
 e policy No. 131, had been paid up to the 1st  
 43, inclusive. The premiums upon No. 159  
*nuary* 1844 inclusive. No premium upon  
 icy had since been paid. By reason of the  
 nt of the subsequent premiums within twenty  
 they became due, the two policies had become  
 void, and they had never been revived.

aster found that there was due to *William*  
*William Fechney Black*, and *John Drewett*,  
 nd directors of the *Britannia* Life Assurance  
*Princes Street*, in the city of *London*, as  
 of *David Salomons* and *Henry Morris Kem-*  
 of the directors of the *London* and *Westminster*  
 ife Assurance Society, and by virtue of the two

X X 2

bonds

1852.

ATKINSON  
 v.  
 GYLBY.

1852.  
 ATKINSON  
 v.  
 GYLBY.

bonds dated respectively the 7th of *February* 1842, and the 19th of *December* 1842, of *William Edwards* principal, and *Frederick Erasmus Edwards* and the testator *John Parker Gylby*, as sureties, (whereby they became severally bound to the said *David Salomons* and *Henry Morris Kemshead* in the penal sums of 900*l.* and 1000*l.* conditioned for payment of the respective sums of 450*l.* and 500*l.*, with interest at the rate of 5*l.* per cent. per annum amongst other sums in the schedule mentioned), the several sums following: viz. for seven several annual premiums of 39*l.* 5*s.* each, in respect of a certain policy on the life of *William Edwards*, No. 131, mentioned in the two several bonds accruing from the 1st of *July* 1844, to the 1st of *July* 1850, both dates inclusive, the sum of 274*l.* 15*s.* for six annual premiums of 40*l.* 11*s.* 8*d.* each, in respect of a certain other policy on the life of *William Edwards*, No. 159 mentioned in the said two several bonds accruing from the 1st of *January* 1845, to the 1st of *January* 1850, both dates inclusive, the sum of 243*l.* 10*s.*

The first exception was, that the Master ought not to have found anything to be due in respect of premiums upon the policies. The Vice-Chancellor allowed this exception, and the *Britannia* Company appealed from that decision.

Mr. *Malins* and Mr. *Cairns*, in support of the appeal.

The bonds are absolute unless the conditions in them are performed; and among the most important of these conditions are those providing for the payment of the premiums necessary to keep on foot the policies, which formed the only security for the advances. The sums secured by the bonds were assignable in equity, and as they were assigned to another insurance Company, the solvency of which is unquestioned, there is no pretence for

1852.

ATKINSON  
v.  
GYLBY.

for saying that the contract was substantially changed, the latter Company having by the arrangements, between the two Companies, taken upon themselves the liabilities of the former. It cannot be said that the policies, the burden of which the *Britannia* Company had taken upon itself, ought not to have been kept on foot. The personal representatives of the testator never refused to accept the liability which the *Britannia* Company took upon itself of paying the insurance moneys. They would have had against the Appellants the full benefit of the premiums previously paid to the dissolved Company. Moreover, although that Company had ceased to carry on business they were not released from their liability upon the policies; and if they chose to direct that the premiums should be paid to other persons as their agents, that would not affect the contract. There

no proviso in the bonds that the Company should on taking other insurances on lives, nor to determine or confine the liability of the obligors in the event of the Company taking no more insurances. Suppose the Company had considered that the insurances which they had effected were sufficient, and determined to run no further risk by increasing their liability, would that be a reason for putting an end to the contract which the testator entered into, and which is not made determinable on any such event?

THEIR LORDSHIPS only desired to hear the Respondents with reference to the premium of 39*l.* 5*s.* which became due on No. 131, on *July* 1, 1844.

Mr. Rolt, Mr. Haldane, and Mr. Buckmaster, for the Respondents.

The premium of 39*l.* 5*s.* was payable in respect of insurance for the year commencing on *July* 1. Unless the Company continued in a condition to afford security for

1852.  
ATKINSON  
v.  
GYLBY.

for the payment of the insurance money during the whole of this period it did not perform its part of the contract, and was not entitled to the premium. Now three months after *July* 1, the Company by its own act dissolved, and distributed the funds which alone, according to the terms of the policy, afforded this security. The payment of the insurance money is to be made out of the funds of the Company. The insurers must continue to be a Company having funds during the whole period for which the premium is payable, or they do by their own act render the performance of the condition of the bond impossible. The reasoning which applies to the other unpaid premiums applies to this also. If the *July* premium had been paid, it could have been recovered back for breach of contract on the part of the insurers in dissolving their Company, and withdrawing the funds which they had charged with the insurance.

Mr. *Malins*, in reply.

There is no pretence for saying that the contract has been broken on the part of the insurance Company.

[*The LORD JUSTICE KNIGHT BRUCE*.—Was it not a breach of contract on the part of the insurers to dissolve their Company and part with their funds? The contract is for payment out of the funds of the Company. Must they not continue to be a Society having funds to perform their part of the contract?]

There is no contract on the part of the insurers to keep any fund intact. It is the liability of the Company to the extent of the funds, and not the funds themselves, to which the insured look. It would lead to the utmost inconvenience to say that the liability upon a contract to insure is to depend upon the amount of funds which the insurance Company may have at any one moment,

or

or upon the manner in which it may have appropriated or disposed of these funds.

1852.

ATKINSON

v.

GYLBY.

*The* LORD JUSTICE LORD CRANWORTH.

The premium of 39*l.* 5*s.* was due in *July* 1844. It was not till three months afterwards that the Company ceased to carry on business. Mr. *Rolt* contends that if the premium had been paid, it could have been recovered back as the consideration had failed. The consideration, however, had not failed totally. The assured, at all events, had the security, contracted for, during a part of the year. If Mr. *Rolt* is right in his argument as to the true effect of the contract being that the Society should continue to carry on business, that might give a right to bring a cross action for a breach of the contract; but the damages in that action would not necessarily be measured by the amount of the premium, 39*l.* 5*s.*

I doubt whether, looking at the policy, there was any such contract beyond this, that so long as the Company existed having funds, those funds should belong to the insured to the extent mentioned in the policy. But assuming the contract to go beyond this, still the right which it conferred in such circumstances as the present was not that of resisting payment of the premium so long as the Company existed, but that of recovering damages which are at present unliquidated.

der opposed the motion, and referred to *Burton (a)*; *Reeves v. Baker (b)*.

1852.  
NORTON  
v.  
WHITE.

RDSHIPS ordered that the Plaintiff should  
r before the first of *September* 1852, or in  
eof, that the bill should stand dismissed for  
ecution.

C. C. C. 626. 461; *Attorney-General v. Coop-*  
v. 115 (*ex rela-* *er*, 9 *Sim.* 379.

ing extract from *J. E. Blunt*, for Plaintiff,  
ok of the day was objects to costs; *Burnell v.*  
that the question *Duke of Wellington*, does not  
was as to costs speak as to costs: *Canham v.*  
*Vincent*, 8 *Sim.* 277.

*R. Palmer* replies.

v. BAKER. *Cur.* Will inquire into prac-  
; for Executor of tice, and decide to-morrow  
endant. morning.

motion to revive *Tuesday 25th March.*

im, or dismiss. A M. R. said there was no  
: since filed, ques- case known for giving Mr. *R.*  
costs: *Burnell v. Palmer* his costs. Therefore,  
*Wellington*, 6 *Sim.* no order on this application.

## CHILD v. ELSWORTH.

*July 16.*  
*August 4.*

is an appeal from the decision of Vice-Chan-  
*Turner*, upon the construction of the will of  
*worth*, dated the 26th of *February* 1833,  
e testator gave, devised, and bequeathed unto  
*nny Elsworth* all his real and copyhold estates,  
purtenances, and all his household furniture,  
, books, china, monies, securities for money,  
ttels, personal estate, and effects whatsoever

Before *The*  
LORDS JUS-  
TICES.

Bequests to  
the sons and  
daughters of  
*D.* of 200*l.*  
each, also to  
the children  
of a son of  
*D.* 200*l.*, to  
be equally  
divided  
and among them,

be paid twelve months after the decease of the testator's widow.  
*ld* to be postponed as to all the bequests till after the widow's death.

1852.  
 CHILD  
 v.  
 ELSWORTH.

and wheresoever, and of what nature or kind soever, for and during her natural life, subject nevertheless to and charged and chargeable with the payments and bequest thereinafter mentioned. And after giving and bequeathing various legacies, and appointing specific periods for their payment, except in the instance of two small legacies given to the legators for their trouble, the will proceeded in the words following:—"Also I give and bequeath to *John, Thomas, Mary, Ellen, Elizabeth, Jane* and *Margaret*, the sons and daughters of my uncle *William Deighton*, the sum of 200*l.* each, also to the children of *Henry* the son of my said uncle *William Deighton*, the sum of 200*l.* to be divided equally amongst them, to be paid twelve months after the decease of my said wife."

The question was, whether the direction as to the period of payment applied to the legacies of 200*l.* each, given to the sons and daughters of *William Deighton*.

The Vice-Chancellor held that it only applied to the 200*l.* given to the children of *Henry*.

Mr. *Glasse* and Mr. *J. V. Prior*, were for the Appellants.

Mr. *Stuart* and Mr. *Springall Thompson*, were for the Respondents.

*Richards v. Baker (a)*, *Fenny v. Ewestace (b)*, *Walker v. Tipping (c)*, were cited.

August 4.

*The* LORD JUSTICE LORD CRANWORTH.

The only question in this case is, as to the time at which a legacy of 200*l.* given to *Ellen Deighton*, under whom

(a) 2 *Atk.* 321.

(b) 4 *Mau. & Sel.* 58.

(c) 9 *Hare*, 800.



~~When~~ the Plaintiff derives title, was payable. The Plaintiff says it was payable at the end of a year from the testator's decease. The Defendant contends, the payment is, according to the true construction of the will, postponed till the expiration of twelve months after the death of the testator's widow.

1852.  
CHILD.  
v.  
ELSWORTH.

[His Lordship read the material parts of the will.]

The general rule was not disputed, (indeed it is so well established as to admit of no doubt), that in the absence of express direction to the contrary, every general pecuniary legacy is payable at the end of a year from the death of the testator. The question is, whether there is anything on the face of this will to take out of this general rule the legacies given to *John, Thomas, Mary, Ellen, Elizabeth, Jane, and Margaret*, sons and daughters of *William Deighton*.

The decision must turn on the point, whether the words, "to be paid twelve months after the decease of my said wife," are to be read as applicable to the legacies given to the seven children of the testator's uncle *William Deighton*, or only to the legacy given to the children of his deceased son *Henry*. Sir *George Turner* adopted the latter construction, and so held that there was no postponement of the legacies given to the seven children of *William Deighton*.

With a most sincere respect for his judgment we have come to a different conclusion. The words "to be paid," &c., import a qualification of what has gone before; the question is, to how much of what has gone before does that qualification extend. We are of opinion that it is a qualification attaching on all the legacies given to the seven children, as well as to the grandchildren of *William Deighton*. It would be difficult to say

1852.  
 CHILD  
 v.  
 ELSWORTH.

say that either mode of construing the language is grammatically incorrect. But yet in strictness, if the words "to be paid twelve months after the decease of my wife," are to be confined to the children of the deceased son *Henry*, and not to extend to the seven living children, those words ought to have been connected with what went before, by the copulative "and." The immediately preceding words "to be equally divided between them," import a qualification which certainly relates solely to the children of *Henry*. If the words immediately following were intended as a further qualification on the same legacy only, then the language ought in strictness to have been, "and to be paid," &c. whereas there is no necessity for such a copulative in the second qualification, namely, that indicating the time of payment, is to be read as applicable to the whole class, children and grandchildren of *William Deighton*, as to whom there had been no previous qualification at all.

It is material to observe that the bequest in question beginning "also I give," and ending "after the decease of my said wife," is one bequest. There is only one set of operative words, and there is only one class of objects, namely, the descendants of *William Deighton*. The sum given to the children of the deceased child is the same as that given to each of the seven children who were living and who are named in the will. The inference is not unreasonable that the testator contemplated an equal bounty to all, treating the children of the deceased son as standing in the place of their father; and this equality would or might be entirely disturbed if the time of payment should not be the same for all. There are no other legacies given by the will, the time for payment of which is not expressly pointed out, except the small legacies of 30*l.* to each of the  
 executors

executors for their trouble; and the presumption therefore is, that the testator intended in all cases to indicate the time of payment. The legacies to the executors for their trouble, would of course be retained by themselves, and would naturally be appropriated by them when the state of the assets permitted it. As to them, therefore, it was unnecessary to name a time for payment, and the omission to do so can hardly be treated as an exception to the general rule followed by the testator: *i. e.* in all cases to say when each legacy should be payable. It is only necessary to add, that we have caused the original will to be examined, and it appears that the whole gift in question to the children and grandchildren of *William Deighton*, including the direction for the time of payment, is written continuously as one sentence, and is closed with a full stop.

1852.  
CHILD  
v.  
ELSWORTH.

On the whole, therefore, we have come to the conclusion that none of these legacies are payable till after the death of the widow; and the result is, that the order made by the Vice-Chancellor must be varied, and instead of directing payment of the 200*l.* and interest to the Plaintiff, it will direct according to the alternative prayer of the claim, that 200*l.* shall be brought into Court and invested for the benefit of the Defendant the widow for her life, with liberty to apply after her death.

The case is one in which we have not derived, nor could we expect to derive, much assistance from previous decisions. It is, according to the language of Lord *Ellenborough*, a question rather for a grammarian than a lawyer, and which a schoolmaster might decide as well as a judge; but perhaps the cases of *Cole v. Rawlinson* (a), *Richards v. Baker* (b), and *Fenny v. Ewstace* (c), are not without a bearing on the subject.

(a) 1 *Salk.* 234.      (b) 2 *Atk.* 321.      (c) 4 *M. & S.* 58.

1852.

July 28.

August 4.

Before The  
LORDS JUSTICES.

The owner of an estate limited to the usual uses to bar dower, mortgaged it in fee, and, by the proviso for redemption, the estate was agreed to be re-conveyed to him, his heirs, appointees, or assigns, or to such other persons, to such uses, and in such manner as he or they should direct. After executing this mortgage the testator made his will, devising the estate, and subsequently paid off the mortgage, taking a re-conveyance to the same uses, in bar of the dower, as the estate was subject to before the mortgage, the dower trustee being the same person in both deeds. The testator died before the Wills Act came into operation. *Held*, that the will was not revoked as to the estate in question.

## PLOWDEN v. HYDE.


THIS was an appeal from the decision of Vice-Chancellor *Kindersley*, reported in 2 *Simons*, New Series, 171, holding that the will of *Henry Chicheley Plowden*, bearing date the 15th of *May* 1811, was revoked as to two parcels of land thereby devised.

By virtue of indentures of lease and release, dated the 22nd and 23rd of *April* 1811, some messuages and lands situate at *Boldre* in the county of *Southampton* stood limited to such uses as *Henry Chicheley Plowden* should by deed or will appoint, and for default of appointment to the use of him the said *H. C. Plowden* for life, with remainder to the use of *J. Dyneley* during the life of and in trust for the said *H. C. Plowden*, and after the determination of that estate, to the use of the said *H. C. Plowden* and his heirs.

On the 1st of *May* 1811, Mr. *Plowden* mortgaged this property to *William Newton* for 3000*l*. The mortgage was effected by indentures of lease and release dated the 30th of *April* and the 1st of *May* 1811, whereby *Plowden* appointed and released and *Dyneley* released the property in question to *William Newton* and his heirs, subject to a proviso for redemption thus expressed: "Provide always, and it is hereby declared and agreed, that the said *H. C. Plowden*, his heirs, appointees, executors, administrators, or assigns shall pay or cause to be paid to the said *William Newton*, his executors, administrators

istrators

rators, or assigns, the sum of 3000*l.* of &c., with interest at the rate of 5*l.* per cent. per annum, on the 1st of November next ensuing, then the said *William Newton*, his heirs and assigns, and all persons claiming under him or them, shall and will, upon the request and at the costs and charges of the said *H. C. Plowden*, his heirs, appointees, or assigns, re-convey and assure the premises unto the said *Henry Chicheley Plowden*, his heirs, appointees, or assigns, or to such other person or persons, to such uses, and in such manner as he or they shall direct."

1852.  
  
**Plowden**  
*v.*  
**Hyde.**

Besides this property at *Boldre*, *H. C. Plowden* was at this time the equitable owner of some land at *South Baddesley*, called *Hornscroft*, which he had in 1809 purchased at a sale by auction, but which land had never been conveyed to him.

Under these circumstances *H. C. Plowden* made his will on the 15th of May 1811, bearing date on that day, and he thereby devised all his real estates at *Boldre* and *South Baddesley* to the said *John Dyneley* and his heirs, for the use of his wife during her widowhood, and then upon trust to sell and divide the proceeds of the sale among certain persons named in the will.

By indentures of lease and release dated the 8th and 10th of November 1811, the lands at *South Baddesley*, which had been contracted to be purchased in 1809, were duly conveyed

to *H. C. Plowden* and his heirs, to the usual uses to bar a recovery, *i. e.* to such uses as he should appoint, and in default of appointment, to the use of himself for life, and the remainder to the use of *John Dyneley*, his executors and administrators, during the life of and in trust for the said *H. C. Plowden* and his assigns, and after the determination of that estate, to the use of the said *H. C. Plowden* his heirs and assigns.

In

1852.  
 ~~~~~  
 PLOWDEN.
 v.
 HYDE.

In *December* 1813, *H. C. Plowden* paid off the mortgage debt due to *Newton*, and by indentures of lease and release dated the 6th and 7th of *December* 1813, the mortgaged lands and hereditaments were reconveyed by *Newton* to *H. C. Plowden* and his heirs, to the same uses precisely to which they stood limited previously to the mortgage.

Mr. *Plowden* died in 1821, leaving his widow surviving him; she died his widow in 1845, and under the trusts of the will the devised property then became saleable.

A suit was instituted for the purpose of having the trusts of the will carried into execution, and an order was made directing a sale.

One of the purchasers required the concurrence of the heir-at-law, on the ground that the devise was revoked by the deeds of *November* 1811 and *December* 1813, and thereupon a petition was presented by one of the parties interested in the produce of the sale, praying (amongst other things) that it might be declared that the deed of reconveyance of the 7th of *December* 1813, did not as to the hereditaments comprised in that deed, operate as a revocation of the will of *Henry Chicheley Plowden* the testator in the cause, and that the legal estate in the same hereditaments descended upon the death of the testator to his heir-at-law as a trustee for the devisees under his will of the equity of redemption thereof, and that it might be declared that the hereditaments comprised in the deed of conveyance of the 9th of *November* 1811, also stated in the petition, were devised by the will of the testator, he having contracted to purchase the same prior to the date thereof, and that if the Court should be of opinion that the devise of the last-mentioned

ed hereditaments was revoked by the said conveyance,
 a that it might be declared that the Defendant
 es *Chicheley Plowden* (who was the son and heir of
 es *Chicheley Plowden* the testator's original heir)
 bound to elect between the last-mentioned heredi-
 ents and the monies to which he would become
 tled under the same will by virtue of the bequest
 his late father, mentioned in the petition, and that if
 should elect to confirm the will, then that he might
 declared a trustee of the same hereditaments for the
 sees under the testator's will.

1852.
 PLOWDEN
 v.
 HYDE.

The Vice-Chancellor held, that both as to the lands at
dre and those called *Hornscroft*, the will was re-
 ed. From this decision the Petitioners appealed.

Mr. *Willcock* and Mr. *Jessell* supported the appcal.

Mr. *Russell* and Mr. *Lewin*, for the heir of the tes-
 r's heir-at-law.

Mr. *Malins*, Mr. *Hetherington*, Mr. *H. Stevens*, and
Erskine, appeared for other parties.

The arguments and authorities relied upon appear
 iciently from the judgments.

The LORD JUSTICE KNIGHT BRUCE.

The question of revocation or ademption, the only
 stion argued before us, in this case, relates to two
 inct portions of the real estates of Mr. *Henry*
cheley Plowden, the testator in the cause: one in-
 ded in a mortgage of the 1st of *May* 1811, and a
 veyance of the 7th of *December* 1813; the other
 luded in neither of those instruments, but comprised
 a deed of the 9th of *November* 1811. With regard

August 4.

1852.
 PLOWDEN
 v.
 HYDE.

to the latter portion, I am unable to distinguish ~~this~~ from the case of *Rawlins v. Burgis* (a), which, decided in 1814 by a careful Judge, since followed in more than one instance, and never, so far as I am aware, overruled, I do not think that we ought to refuse to follow now, whether, if the point of revocation or ademption, that it determined, were new, I should have held an opinion in conformity with that decision or not; as which it is unnecessary for me to say anything.

With respect to the other portion, the title stands thus. The hereditaments of which it consists having been acquired by the testator, were by his desire conveyed on the 23rd of *April* 1811 in this manner; to such uses as the testator should by deed or will appoint, and in default of and until appointment, to the use of ~~the~~ testator for his life, with remainder to the use of *Mr. Dyneley*, his executors, administrators, and assigns during the testator's life, in trust for the testator, with remainder to the use of the testator, his heirs and assigns for ever.

Very soon afterwards, namely, on the 1st of *May* 1811, he mortgaged these hereditaments in fee, *Mr. Dyneley*, as his trustee, joining in the mortgage. The mortgage was *Mr. Newton*, whom, in *December* 1813, the testator paid off; whereupon by his direction *Mr. Newton*, on the 7th of *December* 1813, conveyed the mortgaged hereditaments to the testator and his heirs, to such uses as the testator should by deed or will appoint; and in default of and until appointment, to the use of ~~the~~ testator for his life, with remainder to the use of *Mr. Dyneley*, his executors, administrators, and assigns, during the testator's life, in trust for the testator; with remainder

(a) 2 Ves. & B. 382.

1852.
 PLOWDEN
 v.
 HYDE.

mainder to the use of the testator, his heirs and
 signs for ever. The testator's will devising these
 creditaments having been made on the 15th of *May*
 1811, the point has arisen, whether the effect of the con-
 veyance of the 7th of *December* 1813 was or was not to
 render the will inoperative as to them; a suggestion
 which, however startling to common sense, however
 foreign to natural equity, is yet rendered plausible, if
 not sound, by the state of the positive law of *England*
 at it stood when the testator died in 1821, a state upon
 this particular subject which was discreditable to a civil-
 ized country. It has since been altered, but not with
 reference to the property of those who had ceased to
 live before 1838. Their property is subject to the old
 law, which, however, was such, upon the present point,
 that no man, I suppose, would be willing, without abso-
 lute necessity, to treat a case as falling within it. Does
 any necessity exist here? I think not. I am of opinion
 that the object and intention of the deed of the 1st of *May*
 1811, was to make a mortgage in fee, and not otherwise
 to affect the title of the mortgaged property; and the
 conveyance of the 7th of *December* 1813, having been to
 the same uses, and for the same purposes, as the uses
 and the purposes by which it stood affected immediately
 before the making of the mortgage of the 1st of *May*
 1811, my view of the matter is, that the conveyance of
 1813 did not, beyond freeing the property from the
 mortgage, affect the title to the lands, or the testator's
 interest in them, or his power over them, otherwise than
 in so far only as to make that wholly or in part legal,
 which before had been merely equitable.


It is true that Mr. *Dyneley* never was more than a
 mere trustee for the testator. This, however, seems to
 me to make no difference. For if it is conceded, as in
 my opinion it ought to be, that by the deed of mortgage


and the authorities then cited, and every other within my knowledge, that it could on this dispute be important to refer to, I think that as to the question of revocation or ademption, this case stands exactly on the footing on which it would have stood if the testator, dying immediately before the mortgage been simply redeemed in fee, had, upon paying it off, taken from the mortgagee a simple reconveyance to himself in fee; and since having immediately before the mortgage held the property, subject to the usual limitations for prevention of dower, he upon paying it off took from the mortgagee a conveyance or reconveyance, having limitations the same in form, substance, and object (even the trustee being the same) as existed when the mortgage was made. I am therefore of opinion that it may, consistently with *Tickner v. Tickner* (a), *Rawlins v. Burgis* (b), and with every established rule of law, be held, as I do hold, that this testator's testamentary dispositions are fully validly in force with respect to the mortgaged portions of his real estates, and that so far at least it is not incumbent on the Court to defeat his wishes, disappoint his intentions, and subvert his will.

The LORD JUSTICE LORD CRANWORTH, after stating the facts of the case exactly as they are stated above, proceeded as follows :—

Sir Richard Kindersley decided against the Petitioner, being of opinion that the devise both of the *Boldre* and *South Baddesley* property was revoked, the former by the deeds of reconveyance in 1813, and the latter by the reconveyance of the 8th and 9th of *November* 1811. Against this decision the Petitioner has come before us by way of appeal. The case was heard a few days ago, all

(a) Cited 3 *Atk.* 742. (b) 2 *Ves. & B.* 382.


1852.

 PLOWDEN
 v.
 HYDE.

1852.

 PLOWDEN
 v.
 HYDE.

sed in fee made a mortgage in fee in the ordinary
 v, reserving the right of redemption to himself and
 heirs, and then, before the Act of 7 Will. IV. & 1
 :2. c. 26, had come into operation, devised his equity
 redemption, a subsequent reconveyance to him and
 heirs by the mortgagee, upon the mortgage debt
 ng paid off, did not affect the previous devise of the
 uity. But if the reconveyance was made not to the
 mortgagor in fee, but to him to the usual uses to bar
 lower, this effected a revocation, for the same reasons
 as are applicable to the case of a purchaser. The con-
 veyance in such a case was not merely the uniting of the
 legal with the equitable estate: it effected something
 more, it created new rights and incidents in the pro-
 perty, and so operated as a revocation of the devise.

Assuming that to be clear in the case of a simple
 mortgage in fee, with the right of redemption reserved
 o the mortgagor and his heirs, the Vice-Chancellor then
 roceeded to consider how far that general principle was
 affected by the special terms in which in this case the
 redemption was reserved. The reconveyance is to be
 ' unto the said *Henry C. Plowden*, his heirs, appointees,
 or assigns, or to such other person or persons, to such
 uses and in such manner as he or they shall direct." Even taking these words to indicate the form of recon-
 veyance, (which was the most favourable interpretation
 or the Appellant,) still, though such a proviso would
 have warranted a reconveyance to such uses as the mort-
 gagor should appoint, and in default of appointment, to
 him and his heirs, and though a reconveyance so made
 would not on this construction of the proviso have effected
 a revocation, yet the language used did not in the judg-
 ment of the Vice-Chancellor warrant a reconveyance in
 the form actually adopted, namely to such uses as the
 said *H. C. Plowden* should by deed or will appoint, and
 for

So far, therefore, I concur with the view of the law taken by the Vice-Chancellor.

1852.

 PLOWDEN
 v.
 HYDE.

But as to the second branch of his reasoning, I think there is, at all events, very considerable doubt. I am not prepared to assent to the proposition that if an equity of redemption of a mortgage in fee had before the statute been reserved to such uses as the mortgagor should appoint, and in default of appointment to the use of the mortgagor and his heirs, then a reconveyance to the usual uses to bar dower would have operated as a revocation of a devise made before the reconveyance, when the legal owner in fee, after devising his estate, conveyed it by feoffment or by lease and release to such uses as he should appoint, and for default of appointment, to the use of himself for life, with remainder to a trustee during his life, and with the ultimate use to himself in fee, there was a change of the seisin.

But if the owner of an estate had an absolute power of appointment as well as the legal fee, *i. e.* if his estate ~~too~~ limited to such uses as he should appoint, and for ~~fault~~ of appointment to the use of himself in fee, the ~~sequences~~ might be different. In such a case, if the ~~er~~, after making his will and devising, had made an ~~ointment~~ so as to take an estate with the ordinary ~~and~~ limitations to bar dower, I know of no authority deciding that this would be a revocation of the will. ~~re~~ would in such a case be no change of seisin, and ~~the~~ principles applicable to a devise by a person having ~~re~~ estate in fee simple do not necessarily apply, and ~~s~~ would not have been a revocation at law, it would follow that it would not have been a revocation ~~ity~~, where the subject-matter of the devise was an ~~of~~ redemption.

On

such daughter for her sole and separate use, exclusive of any husband with whom she may marry, and so that her receipts shall be sufficient discharges for the same; and from and after the decease of each and every of such daughter, then upon the trusts thereafter mentioned, for the benefit of the children of such daughter; and in default of issue of such daughters, then in trust for such person or persons and for such purposes as such daughter shall by will appoint; and in default of appointment upon the following trusts, that is to say, upon trust for the brothers and sisters of the whole blood of such daughter then living, equally, and the issue of any brother or sister of the whole blood who may have died leaving issue then living (such issue taking *per stirpes*, and not *per capita*), as tenants in common, and their respective executors, administrators, and assigns; and in default of any brother or sister of the whole blood, or the issue of any such brother or sister, then upon trust for such person or persons as, at the time of the decease of such daughter, shall be her next-of-kin, under and according to the statute made for the distribution of intestates' effects."

1852.
OWEN
v.
BRYANT.

The testator's widow had died, and the surviving trustees and executors had sold the real estates of the testator (there being no leaseholds). Upon the assumption that the net proceeds thereof were divisible into eight equal parts, they paid one such part to each of the Defendants.

The testator and his second wife duly intermarried on the 9th of February 1807, but it had lately been discovered that one of the daughters by her was born before the marriage of her parents. This daughter had always resided in the house of the testator, and was received

v. Adam (a), *Swaine v. Kennedy* (b), *Meredith v. Farr* (c),
Evans v. Davies (d).

1852.

OWEN
v.
BRYANT.

If there is a gift to children of a *living person*, and the illegitimate children are not named or referred to in the will, in that case they will not take: *Swaine v. Kennedy* (e), *Harris v. Lloyd* (f). It was strongly urged in *Wilkinson v. Adam*, that legitimate and illegitimate children could not take together, as it was also in *Gill v. Shelley*, but this was denied by the common-law Judges (g), and not allowed by Lord *Eldon* in *Swaine v. Kennedy* (h). With regard to *Bagley v. Mollard* (i), there must have been in that case a misapprehension of what Lord *Eldon* said in *Wilkinson v. Adam* (k).

Mr. *Waley*, for the trustees, referred to *Fraser v. Pigott* (l), *Bagley v. Mollard* (m), *Godfrey v. Davies* (n).

The LORD JUSTICE LORD CRANWORTH.

This case has been well argued by the learned counsel ; but with all respect to them, I think that a very material passage in the will, to which my attention has been called by my learned brother, has not been touched upon in the argument, nor even set forth in the special case. But for that, I should have had the misfortune of differing from my learned brother as to the construction to be put upon this will, and should have thought that the illegitimate child did not take. My ground would have been this.

I reject

- (a) 1 *V. & B.* 453.
- (b) 1 *V. & B.* 467.
- (c) 2 *Y. & C. C. C.* 525.
- (d) 7 *Hare*, 498.
- (e) 1 *V. & B.* 469.
- (f) 1 *T. & R.* 314.
- (g) 1 *V. & B.* 457.

- (h) 1 *V. & B.* 469.
- (i) 1 *R. & M.* 581.
- (k) 1 *V. & B.* 422.
- (l) *Younge*, 354.
- (m) 1 *R. & My.* 581.
- (n) 6 *Ves.* 43.

which he had previously made upon each married daughter upon her marriage. This provision he then makes, and he then proceeds to give and devise his real and leasehold estate in the following manner. The Lordship read the portion of the will above set out to the letter (a).]

1852.
OWEN
v.
BRYANT.

Now, I must own, that had the will stopped there, I should have thought that legitimate children, and illegitimate children only, were intended; for I cannot see

there would, in that case, have been an absolute necessity to construe the word "children," otherwise according to its natural import. In some of the cases cited, it was thought impossible to construe the word according to its natural import, as in the case of

v. Shelley, where the gift was to the children of a deceased person, who had died leaving only two children, of whom one was legitimate, and the other illegitimate. There it was held, that the illegitimate child was intended to be included, otherwise it was impossible to give a meaning to the word "children," which was in the will. So, also, where the gift is to the "children" of a deceased person, who at his death left none but illegitimate children, there the illegitimate children are supposed to be intended, for otherwise there would be nothing for the will to operate upon. The principle on which Sir *John Leach* acted in *Bagley v. Mollard*, I think, the right one. There the testator bequeathed a leasehold house in trust for *Elizabeth Mollard*, whom he described as the then only surviving child of his son *William Mollard*, and concluded his will by a residuary bequest to all and every the children of his sons *James Mollard* and *William Mollard*, and of his daughter *Rah Bagley*. *Elizabeth Mollard*, the grandchild, being illegitimate, the question was, whether she was entitled to share in the residuary gift. Sir *John Leach*

1852.

MAXWELL v. MAXWELL.

Nov. 3 & 4.

THIS was an appeal from the decision of the Master of the Rolls on a special case, which stated in substance as follows :—

Before *The*
LORDS JUSTICES.

Peter Constable Maxwell, of Richmond in Yorkshire, was in his lifetime and at the date of his will, hereinafter stated, and at the period of his decease, domiciled in *England*, and was in his lifetime and at the date of his will, and at the time of his decease, interested and entitled to three heritable bonds for sums charged upon lands in *Scotland*.

A testator domiciled in *England* and entitled to heritable bonds affecting lands in *Scotland*, made a will according to the English law, whereby, by virtue of every right, power, or authority enabling him in that behalf, he gave to trustees all his real and personal estate whatsoever and wheresoever, upon trusts for the benefit of his wife and all his children.

The testator was also in his lifetime, and at the date of his said will, and at the time of his decease, seised of a small real estate in *Lancashire*, and was entitled in remainder to certain real estates in the counties of *Gloucester* and *Worcester*, in the event of *Thomas Wakeham*, the present tenant for life, dying without issue, and was also possessed of personal property in the public funds, and invested upon other English securities to an amount exceeding 25,000*l*.

The will was inoperative according to the Scotch law, for the purpose of passing the heritable bonds, for want of the word “dis-

By his will, dated the 29th of *February* 1851, which was not in his handwriting, but was duly made, executed, and attested according to the law of *England*, he gave as follows :—

“ By virtue of every right, power, or authority, enabling me
pone” in the devise, and of a proper attestation clause, according to Scotch law. *Held*, that the heir-at-law was not put to his election, but might take the English property under the will without giving up the bonds.

1852.
 {
 MAXWELL
 v.
 MAXWELL.

me in this behalf, I give, devise, and bequeath unto and to the use of Sir *William Lawson* of *Brough Hall*, in the county of *York*, Baronet, and *Edward Wright* of *Richmond*, gentleman, their heirs, executors, administrators, and assigns, all my real and personal estate whatsoever and wheresoever, and whether in possession or reversion, upon trust to permit my dear wife *Helena* to receive and take the rents, interest, dividends, and annual profits thereof for the term of her natural life, in full confidence that she will promote to the best of her power the education and advancement of my children, and after her decease, in trust for all my children, their heirs, executors, administrators, and assigns, equally share and share alike as tenants in common, and not as joint tenants; and I appoint the said Sir *William Lawson* and *Edward Wright* executors of this my will."

The testator died on the 27th of *February* 1851, leaving the Defendant *Frederick Henry Constable Maxwell*, his eldest son and heir-at-law in *England* and in *Scotland*, and the Plaintiffs, all of whom were infants, his only other children. The testator's widow, *Helena Constable Maxwell*, died on the 16th of *June* 1851.


The shares and interest of the testator in the three Scotch heritable securities, did not pass by his will, but had devolved upon and vested in the Defendant *Frederick Henry Constable Maxwell* as the testator's heir.

The reasons which prevented the said shares and interest in the said Scotch heritable bonds from passing by the will were the following:—

1st. The will did not in the words of devise contain the word "dispone," which is essential to a valid disposition of real estate in *Scotland*.

2ndly.

2ndly. It had no such "testing clause," or clause of attestation, as is essential to a valid disposition of real estate in *Scotland*, where it is not holograph, it being necessary that the testing clause should state the place and date of execution, and the names and descriptions of the writer and witnesses.

1852.

 MAXWELL
 v.
 MAXWELL.

If the will had contained the word "dispone" in the devising part, and had had the proper testing clause as aforesaid, it would, according to the laws of *Scotland*, have included and been fully sufficient to pass and vest in the trustees upon the trusts therein declared, the shares and interests in the said Scotch heritable bonds, but subject to the following privilege of the heir-at-law, viz. that the will having been executed on deathbed, it would have been competent to the heir-at-law to set it aside (even if executed with the word "dispone," and with a proper testing clause), in so far as it affected heritable property in *Scotland*.

Had the testator been domiciled in *Scotland* at his death, the will having been made in *England* in the English form, would have been effectual to pass all his personal estate although made on deathbed.

The Scotch law of approbate and reprobate, as applicable to such a case as the present, is the same as the English law of election.

The circumstance that a settlement or *mortis causâ* disposition of heritable property in *Scotland* was executed on deathbed, does not prevent the law of approbate and reprobate being set up against the heir-at-law, if personal estate is given to him by the same instrument.

The

1852.
 {
 MAXWELL
 v.
 MAXWELL.

The question upon which the opinion of the Court was required was, whether the Defendant *Frederick Henry Constable Maxwell* was bound to elect between the said shares and interests in the said Scotch heritable securities (to which the testator was in his lifetime entitled), and the benefits which *Frederick Henry Constable Maxwell* might claim under the said will of the said *Peter Constable Maxwell* as one of his children; or whether, on the other hand, he was entitled to take the benefits under the said will, and also to take as the heir-at-law of the testator the shares and interests in the heritable bonds.

The Master of the Rolls decided in favour of the latter of these propositions.


Mr. *Anderson* and Mr. *Fleming*, in support of the appeal.

The Master of the Rolls intimated that his opinion, independently of authority, would have been in favour of the Appellants, but considered the case as governed by the decisions in *Johnson v. Telford* (a) and *Allen v. Anderson* (b). A very important question therefore is, whether these cases are, in this branch of the Court, binding and conclusive authorities against the appeal. Now in *Johnson v. Telford* (a) there was an important circumstance which does not exist here, namely, that the limitations in the will were inapplicable to Scotch property, and Sir *John Leach* adverts particularly to that circumstance in giving judgment. He says: "The question is, whether it is clearly to be collected, from the general words used, that the testator meant to pass his Scotch estate to the uses of his will. Where a testator uses only general words, it is to be intended that he means those
 general

(a) 1 *Russ. & M.* 244, 248.

(b) 5 *Hare*, 163.

general words to be applied to such property as will, by its nature, pass by his will, and to the *uses* therein expressed. His will cannot affect his Scotch estates, and some of the uses expressed in his will *cannot be applied to Scotch property.*" The force of the decision is also lessened by the distinction which Sir *John Leach* draws between the case and that of *Brodie v. Barry* (a), by saying that in *Brodie v. Barry* the Scotch estate was mentioned in the will. That was a misrecollection, for the devise in *Brodie v. Barry* was merely of all the testator's freehold, leasehold, copyhold, and other estates whatsoever and wheresoever, in *England, Scotland, and elsewhere.* In *Churchman v. Ireland* (b) a general devise of all the testator's estates and effects, both real and personal, which he should die possessed of, was held a sufficient indication of an intention to pass real estate acquired after the date of the will, to put the heir to his election. Therefore, if the other point on which Sir *John Leach* decided *Johnson v. Telford* (c) had not rendered it unnecessary to dispose of the question as to the extent of the words of description, he would probably have looked more particularly at the words in *Brodie v. Barry.*

1852.

 MAXWELL
 v.
 MAXWELL.

With regard to *Allen v. Anderson* (d), Sir *James Wigram* proceeded upon the supposition of Sir *William Grant* in *Brodie v. Barry*, having held, that this Court would deal with real estates in *Scotland* as it would with copyholds in *England.* Sir *William Grant's* observations, however, must be read with reference to the point which he was then discussing, viz. the possibility of reading the will at all as against the heir. There is no analogy between the cases of Scotch real estates and English copyholds, except upon this point, for there is nothing
in

(a) 2 *Ves. & B.* 127.

(b) 1 *Russ. & My.* 250.

(c) 1 *Russ. & My.* 244.

(d) 5 *Hare*, 163.

arded in order to ascertain what was the intention of testator, especially where they are not those of the country of his domicile: *Trotter v. Trotter* (a). It is not far for the purposes of mere interpretation to ascribe to a testator an accurate knowledge of the law of his own country, but to ascribe to him, for that purpose, knowledge of the law of every country in which he has property would be going far beyond any decided case or reasonable presumption. A man may well intend to dispose of his whole property, although, for want of knowing the mode of doing so according to the law of a country where it may be situate, he may not fully comply with every technical requisition of that law.

1852.
MAXWELL
v.
MAXWELL.


The following cases were also cited:—*Ker v. Wauchope* (b), *Gayner v. Cunningham* (c), *Alexander v. Ben-son Trustees* (d), *Dundas v. Dundas* (e), *M'Call v. Call* (f), *Reynolds v. Torin* (g).

Mr. Roundell Palmer and Mr. Bagshawe, for the respondents.

In *Haslewood v. Pope* (h), Lord Talbot thus explained the principle upon which a testator's copyholds were not to pass by a general devise if not surrendered, and there were freeholds to satisfy the words of the will: "For his will must be intended of such lands and tenements as are devisable of their nature." This principle is equally applicable to the present case, and the observations of Sir William Grant and the decision of Sir James Wigram are in conformity with it, and so is *Wentworth v. Fox* (i).

- [The
(a) 3 Wils. & Sh. 407; 4 & Dun. 241; 4 Wils. & Sh. 460.
(b) 1 Bligh, 1.
(c) *Ib.* 27, n.
(d) 7 Sh. & Dun. 817.
(e) 2 Dow. & Cl. 349; 7 Sh.
(f) *Dru.* 283.
(g) 1 Russ. 129.
(h) 3 P. W. 322.
(i) 6 Madd. 363.]

real and personal estate whatsoever and wheresoever to trustees for the benefit of his wife and children; and they take under it, accordingly, all his English property. But the will is of unquestionable invalidity as to the real estate in *Scotland*, which accordingly has descended on one of the testator's children as his heir according to the law of *Scotland*. And it is against this son in respect of the Scotch property which has thus descended, that the question of election in the proceeding before the Court—the only question in the cause—is raised.

1852.

 MAXWELL
 v.
 MAXWELL.

It is said on the part of the other children, and denied on his part, that he must either give up the Scotch property for the purposes of the will, or take nothing under the will; the claim of the younger children being founded on the generality, the universality, of the language of gift contained in it. Nor can he gainsay that the Scotch property was part of the testator's estate, or that the will purports to give all his real and personal estate whatsoever and wheresoever. I apprehend, however, that according to the principles or rules of construction which the English law applies, if not to all instruments, at least to testamentary instruments liable to interpretation, as the will in question is, according to its principles and rules, the generality, the mere universality, of a gift of property, is not sufficient to demonstrate or create a ground of inference that the giver meant it to extend to property incapable, though his own, of being given by the particular act. If he has specifically mentioned property not capable of being so given, the case is not the same: as here, if the testator had mentioned *Scotland* in terms, or had not had any other real estate than real estate in *Scotland*, there might have been ground for putting the heir to his election.

The matter, however, standing as it does, we are, as it seems

1852.
 MAXWELL
 v.
 MAXWELL.

seems to me, bound to hold that the will before us does not exhibit an intention to give or to affect any property that the will was not adapted to pass.

In coming to this conclusion, I suspect that we must be doing what the testator himself would disapprove if he could be heard otherwise than through his will, and I wish therefore that we could consistently with our views of what is right decide otherwise.

I mentioned, during the argument, *Haslewood v. Pope (a)*, *Harris v. Ingledew (b)*, *Judd v. Pratt (c)*, and *Wentworth v. Cox (d)*; many other authorities (fully as many as necessary) were also mentioned at the bar, and others might be referred to, but it would be superfluous to do so. I may be excused, however, for reading a few words from the commencement of the late Lord Chief Justice *Tindal's* judgment in *Doe v. Ludlam (e)*. I mean these: "I agree in the necessity of adhering to general rules in the construction of wills and other instruments. It is expedient that such rules should be held sacred, because they withdraw the decision from the discretion of the individual Judge, and prevent him from pursuing his own views of each particular case; and there is less inconvenience in the hardship which may sometimes be occasioned by a strict adherence to the rule, than in the confusion which must follow on departing from it."

The LORD JUSTICE LORD CRANWORTH.

I need add nothing beyond the expression of my regret at the necessity of the conclusion that has been
 arrived

(a) 3 *P. W.* 322.


(d) 6 *Madd.* 363.

(b) 3 *P. W.* 91.

(e) 7 *Bing.* 279.

(c) 13 *Ves.* 168; 15 *Ves.* 390.

arrived at, and of my concurrence in the correctness of that conclusion. I take the general rule to be that which was referred to by Sir *John Leach* in *Wentworth v. Cox*, that a designation of the subject intended to be affected by an instrument in general words, imports *primâ facie* that property only upon which the instrument is capable of operating. The rule, therefore, would not apply to a case where, on the face of the instrument, it appeared intended to operate on other property, as where property which could not pass, is expressly denoted, which was the case in *Brodie v. Berry*. In this case nothing of the sort occurs, and we should be doing what is unwarrantable, and acting on mere conjecture, if we were to vary this decree.

1852.

 MAXWELL
 v.
 MAXWELL.

The appeal was dismissed, and the costs were directed to be paid out of the estate.

MILNE *v.* GILBART.

August 5.

MILNE *v.* MILNE.

MILNE *v.* WALKER.

RICHARD MILNE, the testator in these causes, by his will, dated the 12th of *April* 1841, gave all his real and personal estate unto trustees, upon trust to convert the same into money in manner therein mentioned, and to invest the proceeds thereof, (after paying thereout his debts and funeral and testamentary expenses, and certain legacies and legacy duty) in manner

Before *The*
 LORDS JUSTICES.

Under a bequest, (in the event of daughters dying without leaving issue,) in trust for the persons who

would at the time of the decease of such daughters respectively, be entitled, as next of kin, or otherwise, to the personal estate of such daughters respectively, under the statutes made for the distribution of intestates' effects, *Held*, that the husbands of the daughters did not take.

1852.
 ~~~~~  
 MILNE  
 v.  
 GILBART.

ner therein mentioned. And he thereby directed that the residue of the said trust funds should be divided into nine equal shares, and that his trustees should stand possessed of one of such ninth shares in trust for the children of the testator's nephew *Thomas Schole Withington* deceased, by *Elizabeth* his wife, who being a son or sons should attain the age of twenty-one years, or die under that age leaving lawful issue them respectively surviving, and who being a daughter or daughters should attain that age or be married, equally to be divided between or amongst them, if more than one share and share alike, and if there should be but one such child the whole for such child. And he thereby directed that the shares of such of them as should be daughters should be subject to the trusts thereafter declared.

The trusts were expressed as follows:—"And my will is, and I further declare and direct, that the share or shares in the same trust premises of such of the said children of the said *T. S. Withington* deceased, who shall be a daughter or daughters, shall upon her or their attaining the said age of twenty-one years or marrying, be held and retained by the said trustees or trustee for the time being of this my will, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes and declarations following; that is to say, upon trust from time to time to receive the dividends, interest, and annual produce arising from the share of each and every such daughter, of and in the said trust premises, and to pay thereout, or (if need be) out of the capital or principal of such share, the yearly sum of 60*l.* and no more, to each and every such daughter until she shall attain the age of twenty-four years, and to accumulate the surplus income arising in the meantime from each such

1852.

MILNE  
v.  
GILBART.

A share at interest, and add the accumulations to the principal, and after such daughters respectively shall be attained the age of twenty-four years to pay the whole of the said dividends, interest, and income thence arising from the share of each and every such daughter, and the accumulations thereof to each such daughter during her natural life, the same dividends, interest, and income, as also the said yearly sum of 60*l.*, to be respectively paid to her for her separate use, free from debts and control of her husband (if any) for the time being, and so that during coverture she shall have power to alien, charge, or anticipate the growing payments of the said dividends, interest, and annual produce or yearly sum of 60*l.*, or any part thereof, and that her receipt alone (notwithstanding any coverture which she may be under), shall from time to time be a full and sufficient discharge for the same dividends, interest, and annual produce or yearly sum or any part thereof, and from and after the decease of every such daughter and daughters respectively, upon trust to pay, sign, and transfer the share or respective shares of the said trust-monies, stocks, funds, securities, and premises which such daughter or daughters respectively had a share and interest, with the accumulations aforesaid (if any) to her and their respective child and children, to be equally divided between or amongst such children (if more than one) share and share alike; and if there be only one such child, the whole of his or her parents' share to be in trust for that one child, the share of each of every such child being a son to be vested in and payable to him at his age of twenty-one years, or being a daughter at her age of twenty-one years or day of marriage, which shall first happen, and in the meantime the income arising from the expectant or presumptive share of each and every such child to be applicable and employed for or towards his or her maintenance and education,

Amongst them. The trusts of the shares of the daughter  
 are thus expressed: "the share or shares of such of the  
 children or issue of my said nephew *Henry Withington*  
 as shall be a daughter or daughters, to be subject to  
 the same or the like trusts for their respective separate  
 inalienable use during their respective covertures, and  
 their respective deaths for the benefit of their re-  
 spective issue, and with the same or the like ultimate  
 trust or limitation over in favour of their next of kin,  
 in default or upon failure of their issue respectively, and  
 the shares of all the said children, both sons and daugh-  
 ters, and also of the respective issue of such of them as  
 shall be daughters, to be under and subject to the same  
 the like powers for the maintenance and education  
 of such of the objects of this present trust as for the time  
 being shall not have acquired absolute vested interest  
 therein, and for the accumulation and appropriation of  
 surplus income arising from such shares respec-  
 tively, powers to married women to give receipts, and  
 other powers, provisoes, and declarations whatsoever  
 are hereinbefore declared, expressed, or contained of  
 with reference to such of the shares of the said one-  
 fourth part of my said residuary estate hereinbefore be-  
 bequeathed to or in trust for the children of my said late  
 nephew *Thomas Scholes Withington*, as shall vest in  
 belong to a daughter or daughters of the said  
*Thomas Scholes Withington*, and the dividends, inte-  
 rest, and income, thereby arising in the same manner  
 as fully and effectually to all intents and purposes as  
 the said trusts, powers, provisoes, and declarations had  
 been here repeated at length with reference to the said  
 daughters of my nephew *Henry Withington*, objects of  
 this present trust, and the shares of the said trust premises  
 intended to be hereby provided for them respectively."

1852.  
 MILNE  
 v.  
 GILBART.

The testator died on the 18th of *August* 1841, and  
 D. L. II.                      A A A                      D. M. G. the

*Polmondeley v. Lord Ashburton* (a), *Kilner v. Leech* (b),  
*Wiley v. Wright* (c), *Garrick v. Lord Camden* (d).

1852.

MILNE

v.

GILBART.

Mr. *Bacon*, in reply.

*The* LORD JUSTICE LORD CRANWORTH.

I confess that when Mr. *Bacon* opened this case, my  
impression was in his favour, but the impression  
which I at first entertained has been materially affected  
by the argument which we have heard upon the other  
side.

I think that in no case where we are interpreting a  
will ought we to indulge in anything like conjecture,  
and particularly in a case like the present, where we  
are to interpret an obscure instrument, and can do  
nothing but see what is the true meaning of the very  
words that have been used. Now here the testator says  
that in the event that has happened, the property is to  
be in trust for the person or persons who would at the  
time of the decease of such daughter or daughters re-  
spectively, or of the decease or failure of her or their  
husband or children respectively (whichever event shall last  
survive), be entitled as next of kin or otherwise to the  
personal estate of such daughter or daughters respect-  
ively under the statutes made for the distribution of  
deceased persons' effects."

The question is, whether the husband is that person,  
those who would be entitled under the Statute of Dis-  
tributions, exclusive of the husband? If there had not  
been the words "or otherwise," it would be clear the  
husband was excluded, because he could not come in  
under the words "next of kin." But the suggestion is,  
that

(a) 6 *Beav.* 86.

(c) 18 *Ves.* 49.

(b) 10 *Beav.* 362.

(d) 14 *Ves.* 372.


1852.  
 MILNE  
 v.  
 GILBART.

that the words "or otherwise" found in this will, not ordinarily found in such limitations, may have been expressly intended to include him, and at all events must be so construed. I was struck with that observation at first, but on following the sentence throughout it is thus: "entitled as next of kin or otherwise, under the statute made for the distribution of intestates' effects."

Now I take it to be quite clear that in order to come within the express words here, the husband must show he is a person entitled under some or one of the statutes made for the distribution of intestates' effects. In my opinion the husband is not so entitled at all. He is entitled by a right paramount. It may be that he is entitled to administer under the Statute of *Edward*, but this is a different right. The Statute of Distributions of 22 & 23 *Charles* II. is in terms so worded, that it might have included the husband, not so as to give him a right, but to take away a right from him. That difficulty afterwards having been contemplated, a declaratory clause was introduced into the Statute of Frauds, to say that the Statute of Distributions was not intended to have any such effect. The effect of the clause thus introduced was to leave the husband just in the condition in which he was before the passing of the Statute of Distributions: namely, with a right to appropriate the property to himself, a right which belonged to him independently of any statute. He has the same right now. But in this case, in order to claim under the will he must claim as entitled under the Statute. I think he is entitled to nothing under the Statute.

Considerable light is thrown on the case by the gift afterwards, in trust for *Henry's* children. It is not absolutely certain the testator meant to make the same provision for the failure of issue in both cases, but,  
 having

having regard to the words of the will, the great probability is that he did, and the words in the trusts for *Henry's* children are "next of kin" only.

1852.  
  
 MILNE  
 v.  
 GILBART.

The words "or otherwise" are not absolutely useless in the place in which they are found, for persons may claim under the Statute of Distributions who are not next of kin, and they would come under those words "or otherwise." My opinion is, that the next of kin take, and not the husband.

*The* LORD JUSTICE KNIGHT BRUCE.

Mr. *Wigram* and Mr. *Goldsmid* are perhaps answerable also for my judgment, for when the case began, my impression was also against them; but my opinion now is, that we may and ought to decide against the claim of the husband, on three grounds, to each of which my learned brother has adverted:—First, that under the Statute of Distributions persons may claim by virtue of kindred who are not next of kin:—Secondly, that it may fairly, and probably with correctness, be contended that the husband's right is not under any Statute of Distributions, inasmuch as the Statute of 29 *Charles* II. in so many words gave or restored to him, by way of declaratory enactment, the right which he would have had if the Statute of the 22 & 23 *Charles* II. had not passed. And in the third place, that the testator has been his own expositor, by the reference to this gift contained in that to the descendants of *Henry*. All parties' costs must be paid out of the estate.

unto the said *Catherine Collins*, the wife of the said *John Collins*, the sum of 200*l.* of like lawful money; and as to all the rest, residue, and remainder of his estate and effects whatsoever and wheresoever, he gave and bequeathed the same unto the said *John Collins* and *Catherine* his wife, their executors, administrators, and assigns for ever.

1852.  
  
*In re*  
 WYLDRE.

Upon the death of *Sally Eaton* in 1851, the trustees transferred the stock purchased with the 700*l.* into Court under the provisions of the Act.

The question was, whether the legacy of 700*l.* was divisible into three or only two equal parts.

Mr. *W. Wellington Cooper*, in support of the former construction.

*Warrington v. Warrington* (a), and *Paine v. Wagner* (b), are strongly in favour of the division into three shares, and so is *Lewin v. Cox* (c). In *Attorney-General v. Bacchus* (d), it was held that a bequest to a husband and wife was a gift to two persons, and the legacy duty was assessed accordingly. *Bricker v. Whatley* (e) may be relied on by the other side, but is distinguishable by the very different form of the bequest there, which was to *A.*, *B.*, and *C.*, and the wife of *C.*, showing that the husband and wife were intended to take only one share.

Mr. *G. W. Collins*, for other parties, supported the same view of the case.

Mr.

(a) 2 *Hare*, 54.

547.

(b) 12 *Sim.* 184.

(e) 1 *Vern.* 233; 4 *Vin. Abr.*


(c) *Serjt. Moore*, 558; *pl.* 759.

154, *tit.* "Baron and Feme"

(d) 9 *Price*, 30; 11 *Price*,

(*M. a* 1, *pl.* 9).

and that they take as one person ; I say “the presumption,” because the nature and context of the instrument may be such as to render a different interpretation necessary ; but it lies on those who assert that the husband and wife take as two rather than one, to demonstrate this from the nature and context of the instrument. In my opinion that is not done here. The context affords a plausible argument of more or less weight each way, not perhaps of much strength either way ; but there is not, in my opinion, a balance against that which would be the ordinary construction. The consequence is, that, in my opinion, the *primâ facie* interpretation must remain as the interpretation absolutely right. Nor do I see how, in this particular will, a different construction could be adopted without substantially contradicting the case of *Bricker v. Whatley*. For reasons stated in the argument, my conclusion here may possibly be consistent with the cases of *Warrington v. Warrington (a)*, and *Payne v. Wagner (b)*. I am not sure that it is not. Viewing the state of the law as I do, and having regard to the case of *Bricker v. Whatley*, I am of opinion that we have no choice in the matter, but must determine that the husband and wife take only a moiety of the fund.

1852.  
  
*In re*  
 WYLDR.

*The* LORD JUSTICE LORD CRANWORTH.

I at first felt some difficulty as to the proper conclusion upon this question, and it is not without some fluctuation that my mind has arrived at the same conclusion as that of my learned brother. I think that we should start from the proposition of *Littleton*, that where a joint estate is made by will to a husband and wife and to a third person, in that case the husband and wife have, in their right, but the moiety. It is true that the proposition

(a) 2 *Hare*, 54.

(b) 12 *Sim.* 184.



not the ordinary form of language if it was meant that all the four legatees named were to participate equally ; therefore it was held, that according to the ordinary construction of a sentence so framed, the word “ and ” occurring before the name of *Stephen Whatley* and *Hester* his wife, must be taken to mean that the persons following it were meant to take, as if they were one person only, the same interest as each of the legatees previously named, the second “ *and* ” which occurred between the names of the husband and wife being merely a subcopulative, showing that the two were to be treated as one person in the distribution of the benefits given, just as they would have been according to *Littleton*, had the case been one of a devise of land. There being, therefore, that distinction between the cases of *Bricker v. Whatley*, and *Warrington v. Warrington*, the latter case is not in the way of the application of the original doctrine laid down by *Littleton*. The case indeed of *Paine v. Wagner* (a), is difficult to be got over ; but that is a case to which one cannot look as to a strictly binding authority, when one considers the anomalous character of the will there, and the difficulty of finding a meaning in it at all. That being so, we are thrown back upon the rule as stated by *Littleton* and the earlier decisions, and by the law as there laid down we are bound to hold, that the husband and wife, whether taking as joint tenants or as tenants in common, are entitled only to one moiety between them in the bequest in question. It is by no means unlikely that the result thus stated is contrary to what the testator intended, and not the less so, possibly, from the circumstance that a legacy of 200*l.* is afterwards given *seriatim* to each of the same legatees. This, however, is mere conjecture, and is not a ground upon which to rely.

1852.

*In re*  
WYLDE.

(a) 12 *Sim.* 184.

1852.

CLOWES v. BECK.

June 12.

**THIS** IS was an appeal from a decree of the Master of the Rolls directing an issue, and in the meantime continuing an injunction to restrain the Defendants from causing or permitting to be removed any stones, shingle, gravel, sand, soil, or other matter or thing from any part of the sea-shore between high and low water-mark, lying within or being appurtenant or adjacent to the manor of *Caister Bardolf*, in *Norfolk*.

The bill stated certain grants (by letters patent) and other assurances, under which the Plaintiff claimed to be seised in fee-simple of the above manor, and particularly of a large tract of land forming part of the sea-shore between high and low water-mark. The Defendants were surveyors of the highways appointed under the 5 & 6 Will. IV. c. 50.

The 51st section of this Act provides that it shall be lawful for every such surveyor, in any waste land or common ground, river or brook, within the parish for which he shall be surveyor, or within any other parish wherein gravel, sand, stone, or other materials are respectively likely to be found, (in case sufficient cannot be conveniently had within the parish where the same are to be employed, and sufficient shall be left for the use of the roads in such other parish,) to search for, dig, get, and carry away the same, so that the said surveyor doth not thereby divert or interrupt the course of such

river

Before *The*  
LORDS JUSTICES.

Although there is no rule that in every instance in which a Defendant takes several grounds of defence, one tenable and successful, the rest doubtful or invalid, that circumstance ought to avail the Plaintiff on the subject of costs, yet where, upon the evidence, the Plaintiff's case failed absolutely and wholly as a case for equitable relief, but the Defendant had in the suit endeavoured to support claims without any just foundation, and had vexatiously disputed the legal title of the Plaintiff: without costs.

Held, that the bill ought to be dismissed

prayed for an injunction in the terms above mentioned.

1852.  
 CLOWES  
 v.  
 BECK.

The Defendant *Beck* by his answer admitted that he was one of the surveyors of the highways. He further stated that from time immemorial the inhabitants of the parish of *Caister* had taken stones deposited on the sea-shore, for any purposes for which they might be required, without an interruption, let, or hindrance on the part of the lords of the manor of *Caister*, and that the surveyors of the highways of the parish of *Caister* had in like manner from time immemorial taken and used stones deposited as aforesaid on the said coast between low and high water-mark, without any let, hindrance, or interruption on the part of the lords of the manor of *Caister*, or any claim on behalf of the said lords, or any compensation paid to them, and had used the stones so taken for the purpose of repairing the highways of the said parish. He further stated that the removal of the said stones as aforesaid did not in any way injure or prejudicially affect the coast or affect the receding or advance of the sea thereon, and did not occasion any such damage or expose the said coast to any such danger or injury as was in the bill alleged. He said that he had been informed and believed that since the year 1803, the Plaintiff had been the lord of the manor of *Caister*, but could not set forth as to his belief or otherwise whether the Plaintiff was in possession of such rights and interests as in the bill alleged, or any rights or interests in the sea-shore lying within or adjacent to the manor within high and low water-mark. He believed, however, that the land or shore in the parish of *Caister* between high and low water-mark was not appurtenant to the manor of *Caister*, or part of the said manor, and that even if such grant was (as in the bill alleged) made by the crown of the manor and its appur-

B B B 2

tenances,

1852.  
CLOWES  
v.  
BECK.

tenances, such grant did not compromise the rights of the crown between high and low water-mark, but that the land between high and low water-mark as aforesaid was still vested in the Queen; and he denied, to the best of his belief, that the Plaintiff had, ever since the year 1803, or since any other time, been absolutely entitled to all such stones and sand lying on the sea-shore aforesaid within or adjacent to the said manor. He said that even if it should appear that the Plaintiff was so entitled, the inhabitants of the parish of *Caister* aforesaid had acquired by immemorial usage the right to take away the stones lying on the sea-shore aforesaid, or at all events that the surveyors of the highways of the parish of *Caister* had by such immemorial usage, as well as under and by virtue of the above Act of Parliament, the right to take away and remove the stones lying on the sea-shore aforesaid within the manor, for the purpose of repairing the highways of the parish. He said that the other Defendant, *Richard Septimus Clowes*, was a son of the Plaintiff, and refused to join in this defence. He admitted the removal of about ten or fifteen cart-loads of stones from the sea-shore adjacent to the said manor, but said that, for the reasons aforesaid, he believed the land between high and low water-mark not to be a part of the said manor of *Caister*, and that he did not remove such stones from the sea-shore within the said manor, nor from the lands over which the Plaintiff was entitled to such rights as in the bill mentioned, or any other rights. He submitted that the Plaintiff was not entitled to such relief as was by his said bill prayed, as well for the reasons thereinbefore in that behalf mentioned, as also because no materials fit and proper for the repairs of the highways of the said parish of *Caister* could be found or obtained elsewhere than on the said sea-shore, conveniently within the parish of *Caister*, or within several miles thereof, and because he had not  
taken

taken or carried away more stones from the said sea-shore than he had thought in his discretion necessary to be employed in the amendment of the highways of the parish of *Caister*, and also because the removal of the said stones by him in manner aforesaid, had not caused and could not cause any damage or injury by inundation to the land adjoining, or any increased injury by the encroachment of the sea. And he claimed the benefit of the above-mentioned Act of Parliament of the 5th & 6th *Will.* IV., and of all the clauses and provisions therein contained, and the powers conferred on him by the said Act as surveyor of the parish of *Caister*.

1852.  
 CLOWES  
 v.  
 BECK.

An injunction was obtained *ex parte*, and on a motion to dissolve it, was continued to the hearing.

Evidence was then gone into by the Plaintiff at great length, for the purpose of establishing his title.

Upon the cause coming on to be heard before the Master of the Rolls, his Honor made the order now under appeal, which, after reciting that his Honor was desirous to have the following question decided by a jury, viz. : “Whether the removal of stones and shingle from the sea-shore of the parish of *Caister*, next *Great Yarmouth*, in the county of *Norfolk*, between high and low water-mark, would cause increased danger of encroachment by the sea,”—directed that a writ of summons should be sued out of the Court of Exchequer by the Plaintiff against the Defendant *George Beck*, pursuant to the provisions of the 8 & 9 *Vict.* c. 109, s. 19. And it was ordered that the parties should proceed to trial under the said writ of summons at the next Summer Assizes for the county of *Norfolk*. And if the jury should find such issue in the affirmative, then it was ordered that the following issue should be then and there  
 tried

*The* LORD JUSTICE KNIGHT BRUCE.

1852.

CLOWES

v.  
BECK.

In this case the sole Plaintiff was originally and is *Mr. Clowes*, the proprietor of a mansion-house and *lord* on the coast of *Norfolk*, and lord of a sea-side *manor* (that of *Caister Bardolf*) there. The only Defendants have been and are *Mr. Beck* and *Mr. Richard Potimus Clowes*, of whom the latter supports and takes *issue* with the Plaintiff his father, leaving *Mr. Beck* as Plaintiff's single adversary. The whole object of the *bill* appears from the prayer of the bill, which was originally and is in these terms: (His Lordship read it).

An interlocutory injunction substantially, if not exactly such as that prayed, was obtained in the cause and the hearing, though not made perpetual, yet continued the decree which directed the trial of an issue or two *issues*, and was thus: (His Lordship read it).

From this decree *Mr. Beck* appealed, and the appeal, having been fully heard, is now to be disposed of. We stated, on a former day, that we thought a trial at law either necessary nor proper; and that, in our opinion, the learned judge who made the decree would not have rected one if the particular position of the Defendants and of the cause at the time of the hearing, as distinguished from what it was at the filing of the bill, had been pointedly brought to his Honor's attention. The Defendants were and are sued in effect merely as the surveyors of the highways of the parish of *Caister*, on account of acts done, or intended, or both done and intended, by them or one of them, namely, *Mr. Beck*, as claiming a right in that character under the 51st section of the Highway Statute, 5 & 6 Will. IV. c. 50, to take from the sea-shore materials for mending the parish roads, against which the Plaintiff not only opposed the

52nd

the Plaintiff's case, as a case for equitable interposition, I do not say for merely legal redress, fails absolutely and wholly. Still we might perhaps have thought a trial at law proper had not the peculiar state of circumstances existed to which I have adverted. But the materials before the Court make us more than suspect that the Appellant, as the agent or coadjutor of others, has been more than willing to assert against the Plaintiff, without just foundation, alleged rights exceeding and independent of any possibly conferred by the Act of *Will.* IV.; and that those alleged rights, thus exceeding and independent of any official power or statutory function, have, under the colours of the highway surveyors, as officers under the Act of Parliament, been endeavoured to be fought in this suit against the Plaintiff. We are satisfied that Mr. *Beck's* answer has, without necessity, without foundation, and vexatiously, raised points, which ought not to have been raised, against the title of the Plaintiff, and in support of the alleged lawfulness of the acts of the Appellant, who has thus, in our opinion, added to the expense and weight of the cause in a manner not to be passed over. He had no ground for disputing the title of the Plaintiff as lord of the manor to the shore, or for claiming the immemorial rights which, in defiance of law and fact, have been alleged against Mr. *Clowes*. And, without meaning to say or intimate that in every instance in which a Defendant takes several grounds of defence, one tenable and successful, the rest doubtful or invalid, that consideration ought to avail the Plaintiff on the subject of costs, we are of opinion that the justice of the present case not only requires an end of the litigation now, but requires also neither of the parties to pay costs,—a condition of things rendering it a matter of indifference on each side what may be the form of the decree, in this untoward suit, for which  
the

1852.

CLOWES

v.

BECK.

1852.

TURNER  
v.  
EVANS.

Defendant in *Palace Street* and *Hole-in-the-Wall Street*,  
n *Caernarvon*, for the price of 1400*l.* And the Defend-  
nt thereby further agreed to sell to the Plaintiffs, and  
hey agreed to purchase, the whole of the stock at *Caer-*  
*arvon* for 1400*l.*, and the stock of wines, spirits, liquors,  
orter, cider, perry, fixtures, utensils of trade, and all  
ie stock in trade in and upon the said premises at a  
aluation as therein mentioned. The agreement then  
roceeded as follows: "And it is hereby further agreed  
y and between the said parties, that, in consideration  
f the premises and of the undertaking of the said  
*Thomas Henry Evans*, hereinafter contained, not to set  
p or carry on at *Caernarvon*, or in any other part of  
ie counties of *Caernarvon*, *Anglesey*, or *Merioneth*, the  
usiness of a wine and spirit merchant, or either of  
iem, they the said *Thomas Turner* and *Llewellyn Turner*  
all pay to the said *Thomas Henry Evans* at the time of  
ie signing of this agreement the sum of 2000*l.* in the  
ature of and as a premium for the good-will of the said  
usiness of a wine and spirit merchant now carried on  
the said *Thomas Henry Evans*. And the said *Thomas*  
*Henry Evans*, in consideration of the premises and of the  
yments aforesaid, doth hereby promise and agree with  
id to the said *Thomas Turner* and *Llewellyn Turner*  
at he the said *Thomas Henry Evans* shall not nor will  
at any time or times hereafter by himself, his partner or  
agent, or otherwise howsoever, either directly or indi-  
rectly, set up, embark in, or carry on the business or  
trade of a wine and spirit merchant at *Caernarvon* afore-  
said, or at any other town or place within the three  
Counties of *Caernarvon*, *Anglesey*, and *Merioneth*." And  
it was further agreed that Messrs. *Thomas* and *Llewellyn*  
*Turner* should and might carry on business under the  
style or firm of *Evans* and *Turner*, until otherwise  
agreed upon, the said business being so carried on ex-  
clusively for the benefit of Messrs. *Turner*, and the  
Defendant




as I concur with the view that was taken by the Vice-Chancellor *Kindersley*, the result will be that his judgment will be affirmed, and consequently that there will be no injunction.

1852.  
TURNER  
v.  
EVANS.

The ground on which I proceed is this. It is enough, I think, to sustain that judgment, that it was a matter of doubt whether the acts complained of amounted to a breach of the contract.

The contract was thus. Mr. *Evans* the Defendant had for some time carried on the business of a wine and spirit merchant at *Caernarvon*. He sold his business substantially to the Plaintiffs. They gave a very large sum for the purchase of the good-will; and he entered into that agreement which forms the subject of the motion; namely, that he was not at any time during his life to set up, embark in, or carry on the business of a wine and spirit merchant at *Caernarvon*, or at any other town or place within the counties of *Caernarvon*, *Merionethshire*, and *Anglesey*. He did not carry on such business of a wine merchant until about the end of the year 1850, or the beginning of 1851, when he set up the business of a wine and spirit merchant at *Chester*. That, no doubt, was lawful for him to do. The evidence on the part of the Plaintiffs shows that in the month of *April* of last year, being at *Caernarvon*, he in three different instances specifically mentioned, applied for orders to the public, or persons from whom he would expect orders, and in that one instance he got an order, and that in others he was refused. As far as the Plaintiffs' affidavit goes, these might be treated as mere insulated instances; but I do not so treat them, because, coupling the statement with the affidavit of the Defendant, I arrive at the conclusion that the Defendant means to say, that he did that which is alleged against him, in pursuance

within the meaning of that expression as contained in a particular instrument, where the term “ wine merchant ” must, I am of opinion, be considered as used to designate a person selling wine with a view to profit, not more and not less.

1852.  
  
 TURNER  
 v.  
 EVANS.

The term “ carry on ” is probably a flexible expression, and one that must be interpreted, or aided in its interpretation, by the context—by the object for which, and the circumstances under which, it has been used.

Now, what has the Defendant done? Having or not having (it is immaterial which) a dwelling-house, counting-house, cellars, and a stock of wine, at *Chester*, but having not any one of these things in the county of *Caernarvon*, nor any establishment of any kind there, he may, with sufficient accuracy for every present purpose, be represented as having gone into *Caernarvonshire*, there solicited and there obtained orders as a wine merchant from inhabitants of that county, and executed those orders by supplying to the persons from whom he received them, the wine ordered, by sending it from another county to them in *Caernarvonshire*, thereby making them, of course, his debtors for the price ; and it is said, that nevertheless he has not carried on the business of a wine merchant in *Caernarvonshire*. But a person selling wine with a view to profit is, I apprehend, not necessarily a person having a dwelling-house, a counting-house, a shop, or cellar, or even wine itself. It is or may be true that, at the time of the execution of the instrument under consideration, the Defendant had, and the Plaintiffs, who were parties to it, intended also to have, all those things ; not one of them is or was essential, however, as I think, to the idea or notion of a person selling wine with a view of profit. There are upholsterers, haberdashers, managers of theatres, and other dealers

1852.

TURNER

v.

EVANS.

dealers "*quorum plaustra vagas rite trahunt domos*," and why not wine merchants? Are there not dozens or hundreds of coal merchants, for instance, in this town who own neither house, nor ship, nor waggon, nor yard, nor coals, but who obtain orders, and execute them by giving corresponding orders to some other dealers in coals who possess such things?

Do none carry on business in *Smithfield* but the surrounding householders? Do we "carry on" a war only at head quarters? and what is meant by "carrying on" a design?


Ought the words "carry on," as used in the contract, to be read as meaning or including the meaning of "pursue" or "prosecute?" If they ought, the Defendant must surely, I suppose, be in the wrong here. But if they ought not, I am still not persuaded that the Plaintiffs are so.

If, however, it is not essential to a wine merchant to have a house, or counting-house, or cellars, or stock, but is only essential that he should sell or endeavour to sell wine, does he not "carry on" that business not necessarily where his home (if any), his counting-house (if any), his cellar (if any), or his stock (if any), is, but where he does the essential act? I am of opinion that he does. If he has a counting-house or a cellar he may probably or certainly be said in a sense to carry on his business there, but not necessarily there exclusively.

The consequence is, that the Defendant, in my judgment, has broken his contract, and, thinking that he has done so in bad faith and dishonestly, I consider that the Plaintiffs have shown a sufficient title to an injunction, at least in the words of the instrument before

us.

us. But my learned Brother being of opinion that the order of the Vice-Chancellor ought to remain as it is, it will of course remain so, and I need not add how likely a conclusion that has the concurrence of two such men is to be correct.

1852.  
  
 TURNER  
 v.  
 EVANS.

---

The action was tried at the *Caernarvon* Assizes, when a verdict was found for the Defendant. During Easter Term, 1853, a rule was obtained to show cause why the verdict should not be entered for the Plaintiffs, with nominal damages. On cause being shown on *June* 6th, 1853, the rule was made absolute, the Court of Queen's Bench being unanimously of opinion that the acts in question amounted to a breach of the covenant.

---

On the 23rd of *June* judgment was signed for the Plaintiffs.

On the motion being renewed before the Vice-Chancellor on this day, a decree was taken by consent, granting a perpetual injunction in the words of the covenant, and directing payment by the Defendant of the costs of the suit. *July* 14, 1853.

1852.

Nov. 3.

In the Matter of NEDDY HALL'S ESTATE.

Before *The*  
LORDS JUSTICES.

Extracts from parish registers signed by persons, describing themselves in such signatures as "rectors" or "vicars," held sufficient within 14 & 15 *Vict.* c. 99, but not where the description was "incumbent" or "curate" without further evidence.

**T**HIS was a petition for the payment of money out of court, and a difficulty having been raised in the Registrar's office as to the sufficiency of some of the documentary evidence under the 14 & 15 *Vict.* c. 99 (a), the case was, at the request of Vice-Chancellor *Turner*, mentioned to their Lordships, in order that the practice might be settled.

The documents in question purported to be copies of or extracts from parish registers, and were signed thus,  
"A. B.,

(a) Sect. 14. "Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents proveable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any Court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified

copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words."

Sect. 17. That, "If any person shall forge the seal, stamp, or signature of any document in this Act mentioned or referred to, or shall tender in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall upon conviction be liable to transportation for seven years, or to imprisonment for any term not exceeding three years, nor less than one year, with hard labour."

“ *A. B.*, Incumbent,” or “ *A. B.*, Rector,” or “ *A. B.*, Vicar,” or “ *A. B.*, Curate.”

1852.

*In re*  
NEDDY  
HALL'S Es-  
TATE.

Their LORDSHIPS expressed their opinion that the words “ Rector,” “ Vicar,” in the copies, might by a reasonable intendment be taken to mean “ Rector ” or “ Vicar ” of the parish or place mentioned in the copy, but that where the words were only “ Incumbent ” or “ Curate,” it might be a question whether such persons were the proper persons to have the custody of registers. Lord *Cranworth* observed that solicitors would save themselves and the Court much trouble, and their clients expense, if in all such cases, to the name of the person signing the extract, the words “ of the aforesaid parish ” were added.

1852.

Nov. 8, 9. LORD WARD *v.* THE OXFORD, WORCESTER,  
AND WOLVERHAMPTON RAILWAY COM-  
PANY.

Before *The*  
LORDS Jus-  
TICES.

A railway  
Company  
had entered  
into an agree-  
ment with a  
landowner  
for the pur-  
chase of land  
A. They  
found that  
they did not  
at the time  
require this  
land, but

THIS case was originally set down as an appeal mo-  
tion from the refusal of the Master of the Rolls, to  
dissolve an injunction which had been obtained *ex parte*;  
but upon the appeal motion coming on, an arrangement  
was entered into for putting in an answer, and for enter-  
ing into evidence by affidavit or *vivá voce*, and for the  
cause being disposed of, as if it had regularly been  
brought to hearing.

The suit was one for the specific performance of an  
agreement,

required immediately land B. belonging to the same landowner. He con-  
sented to sell them B., if they would at the same time pay for A. The  
finance committee of the Company drew a cheque for the price of A. and  
another for the price of B., and left the chairman to make the best arrangement  
he could with the landowner. The agent of the landowner received both  
cheques, upon an agreement that the cheque for B. should not be presented for  
a week, to give time for the completion of a more formal agreement as to the  
purchase of A. than that which had been executed. The preparation of the  
agreement having been delayed beyond the week, communications took place  
between the chairman of the finance committee (who was one of the drawers of  
the cheque) and the landowner's solicitor, in which the former desired that the  
cheque might continue to be retained, as the agreement was not completed.

It appeared that the fact of the cheque being outstanding had been the  
subject of discussion in the finance committee, and had been considered by  
them unsatisfactory. Before the execution of the agreement, and before the  
presentation of the cheque, the bank failed on which it was drawn, and in  
which the chairman was a partner. Held, that, whether the chairman, in  
desiring the presentation of the cheque to be delayed, was acting *ultra vires*  
or not, his act was sanctioned by the committee and bound the Company, and  
that the Company, and not the landowner, must bear the loss.

But *semble*, that the chairman was not acting *ultra vires*, being one of the  
drawers of the cheque.

The cheque was not dated as drawn at any place, but was headed with the  
name of the railway. Held, that this did not indicate any place so as to satisfy  
the terms of the clause in the Stamp Act exempting cheques from duty; but  
that the cheque was void, and that on this account, independently of any other,  
the loss must be sustained by the Company.

agreement, for the purchase by the Defendants of lands of the Plaintiffs under the following circumstances.

1852.

LORD WARD

v.

THE OXFORD  
RAILWAY CO.

The Defendants were by their Act of incorporation entitled to take portions of lands, which, by the will of the late Lord *Dudley* were devised to uses under which the Plaintiffs Lord *Ward*, the Earl of *Aberdeen*, and Lord *Dunfermline* had power to dispose of them.

As to part of these lands, which for the sake of distinction we shall call the 5500*l.* purchase, the Company in *April* and *May* 1847, gave to the Plaintiffs notices in the statutory form, of their intention to take them, and on the 19th of *July* 1848, the following agreement respecting them was signed by the respective agents of the Plaintiffs, and of the Company :—

“ Heads of agreement between the *Oxford, Worcester, and Wolverhampton* Railway Company and Lord *Ward*, and the trustees of his estate. The sum to be paid by the Company for the hereditaments comprised in the notices to purchase, and the claim of *May* 19th 1847, made thereupon, (severance and injury by abstraction, except as hereinafter mentioned, to be deemed to be included) 5500*l.* Also in respect of the tenant’s claim, 182*l.* Proviso, that this memorandum of agreement shall not alter, prejudice, or affect the agreement of *July* 26th 1845. Lord *Ward’s* estate to pay all further compensation (if any) to tenants. Also to give possession on payment of the money. It is understood that, as regards Nos. 21, 22, 23, and 24, in *Sedgley*, the same are copyhold, and as to which Lord *Ward* is entitled to manorial rights only. The money to be paid by the Company to be apportioned between the trustees of the estates of the late Earl of *Dudley* and Lord *Ward*, in such proportions as their agents may require. Dated *July* 19, 1848. For the



1852.  
 LORD WARD  
 v.  
 THE OXFORD  
 RAILWAY CO.

the *Oxford, Worcester, and Wolverhampton Railway Company, Ebenezer Robins*. For the trustees of the estates of the late Earl of *Dudley* and for Lord *Ward, John Maughan*.”

The agreement of the 26th of *July* 1845, referred to in the above document, was made between *Francis Rufford* the Chairman, of, and for, and on behalf of the Company, of the one part, and *Richard Smith*, as agent for and on behalf of Lord *Ward*, of the other part; and it provided, that in the event of the then contemplated Act passing into a law, the Railway should be carried and made across the lands in a particular manner therein described and defined.

With respect to the other lands, which for distinction we shall call the 5625*l.* purchase, no notices were served, but a parol agreement was entered into between the agents of the respective parties for the sale of them to the Company at that price.

Before anything further had been done as to the 5500*l.* purchase, the Company became desirous to have possession of the land comprised in the other, but were informed that this would only be acceded to upon the terms of their completing the 5500*l.* purchase. Thereupon Mr. *Rufford* wrote to Mr. *Maughan*, the Plaintiffs' agent, the following letter:—

“ *Bellbroughton, April 23rd, 1851.* Dear Sir,—*Oxford, Worcester, and Wolverhampton Railway.* The Directors are most desirous to get the possession of land required between *Brettell Lane* and *Dudley*, and are prepared to pay over to Lord *Ward* the sum of 5625*l.*, the amount agreed upon, as soon as the agreement is executed, and Mr. *John Davis* will call upon you for  
 this

this purpose to-morrow morning, when I presume you will give the contractors permission to enter. Let me know if I shall remit the cheque direct to Mr. *Benbow* or to yourself. The further sum of 5500*l.*, the amount of the contract entered into with regard to lands on other portions of the line, the Directors are also prepared to pay over. As, however, this land is not yet required, the Directors had hoped the purchase-money for the land required would be only demanded in the first instance, in conformity with an understanding that the Company, upon paying an ample sum for what they required, were from time to time to take possession without paying for the entirety."

1852.  
 LORD WARD  
 v.  
 THE OXFORD  
 RAILWAY Co.

Mr. *Maughan*, however, still refused to deliver up possession to the Defendants of the 5625*l.* purchase, unless the Company would, at the same time make arrangements for completing the 5500*l.* purchase, and in consequence of this refusal, Mr. *Davis* and Mr. *Rufford* called on Mr. *Maughan* at his office in *Dudley*, and handed to him two cheques, one for 5625*l.*, the other for 5500*l.* The latter was in the following form :

" *Oxford, Worcester, and Wolverhampton Railway.*

" 1851. Messrs. *Rufford & Wragg, Stourbridge.* Pay No. 1453, or bearer, the sum of Five thousand five hundred pounds.

" *F. Rufford,*  
 " *Za. A. Jesell,* } Directors.

" *Noel Thomas Smith, Sec.*"

A contract was thereupon executed by Lord *Aberdeen*, Lord *Dunfermline*, and also by Mr. *Davis* on behalf of the Company, for the 5625*l.* purchase, and the 5625*l.* cheque was presented and paid. Upon the delivery of  
 the

1852.  
 LORD WARD  
 v.  
 THE OXFORD  
 RAILWAY CO.

the cheques Mr. *Maughan* handed over to Mr. *Rufford*, at his request, the following letter, addressed to Mr. *Davis*.

“*Dudley, April 26th, 1851. Dear Sir,—I acknowledge that I have this day received a cheque on Messrs. Rufford & Wragge, dated 27th March last, for 5500l., being the amount of purchase made on the 19th May 1847, with Mr. Ebenezer Robins, as agent for the Oxford, Worcester, and Wolverhampton Railway Company, which cheque I engage to hold for a week, to afford time for said Mr. E. Robins to enter into a contract similar to that which has been this day signed by you and me in reference to other properties purchased from Lord Ward’s estate.—John Maughan, as agent for Lord Ward.*”

The cheque for 5500l. was in consequence of the above arrangement retained by Mr. *Maughan*, until the 4th of *May* 1851, when he sent it to Mr. *John Benbow*, the Plaintiffs’ solicitor. Afterwards, considerable further delay than was originally expected took place in regard to the preparation of a more formal contract for the 5500l. purchase. At length the solicitors of the Company sent to Mr. *Maughan* a letter, stating as follows:—“We have forwarded two parts of the agreement to Mr. *E. Robins* for his signature, and have requested him to send them to you for your signature; and when you have signed the same, be pleased to forward us one part, and keep the other yourself. You will also sign the receipt for 5500l. The agreement is like the other, except so far as the same is varied by your and Mr. *Robins*’ minutes of purchase.”

On the 9th of *June* 1851, Mr. *Robins* accordingly called upon Mr. *Maughan* in *Dudley*, and proposed to  
 him

him to execute one part of the agreement in duplicate, to which Mr. *Robins* had previously attached his own signature, embodying in formal language the terms contained in the agreement of the 19th of *July* 1848.

1852.  
  
 LORD WARD  
 v.  
 THE OXFORD  
 RAILWAY Co.

Mr. *Maughan*, however, remarked that the agreement did not make an apportionment of the purchase-money between the Earl of *Aberdeen* and Lord *Dunfermline* on the one hand, and Lord *Ward* on the other, as originally stipulated, and he requested Mr. *Robins* to strike out his signature, and leave the proposed agreement in order that the apportionment might be made.

Nothing further was done in relation to the proposed formal agreement until after the stoppage of the bank; and the proposed further agreement was never signed.

Simultaneously with these negotiations others were in progress between the same parties with respect to a proposed deviation of the Railway, and although the proposed deviation agreement did not affect the lands comprised in the 5500*l.* purchase it was considered desirable on both sides, that the deviation agreement should not be signed or acted upon until the proposed formal agreement as to the 5500*l.* purchase should be ready for execution, and it was arranged that the deviation agreement and the formal agreement for the 5500*l.* purchase should be executed contemporaneously.

On the 3rd of *May* 1851, Mr. *Benbow* wrote as follows to Mr. *Rufford* in a letter inclosing another from Mr. *Smith*: “Mr. *Smith* has written to you, but, as he has addressed you at *Bellbroughton*, I send you a copy of his letter, which, supposing you remain in town, you would not receive before *Monday*. This matter might probably have been set right if you had applied to me  
 instead

1852.  
 LORD WARD  
 v.  
 THE OXFORD  
 RAILWAY CO.

instead of Mr. *Maughan* upon the late transaction." The enclosure was as follows: "*Priory Office, Dudley, May 2nd, 1851.* Dear Sir,—In going over the ground yesterday with Mr. *Treadwell* where the *Worcester and Wolverhampton* line is proposed to be made near *Woodside*, I observed that several men were employed removing earthwork. As the agreement for the proposed deviation has not been finally concluded, I beg to suggest that the workmen be removed till that has been done. I find from Mr. *Maughan* that he was under the impression that everything has been long ago finally arranged."

On the 4th of *May* 1851, Mr. *Rufford* replied by a letter addressed to Mr. *Benbow*, containing the following passage:—"With reference to the remark in your note, I had no notion that anything required to be set right. We certainly felt aggrieved at the demand that the purchase-money for the land contained in Mr. *Robins'* agreement should forthwith be paid, as it was in direct contravention of a previous understanding. We were, however, told why the demand was made, and although we felt the injustice of the reason assigned, we submitted to it rather than delay the progress of the undertaking. Of course you will now return the cheque for 5500*l.*, as it was handed over to Mr. *Maughan* and received by him (to use Mr. *Smith's* words) under the impression that everything had been long ago finally arranged. Waiting to hear further, I remain, &c.—*Francis Rufford.*"

Mr. *Benbow* replied as follows, on the 5th *May* 1851:—"As you and Mr. *Smith* are in correspondence, and are so near to each other, I cannot doubt that whatever remains to be done will be satisfactorily arranged. I have no recollection of the understanding to which you allude

allude, nor of the reason said to have been assigned for the immediate payment of the purchase-money."

1852.  
 LORD WARD  
 v.  
 THE OXFORD  
 RAILWAY CO.

On the 7th of *June* 1851, Mr. *Benbow* wrote to Mr. *Rufford* as follows:—"I have received a letter from Mr. *Smith*, dated 5th, in which he says all the points in discussion have been adjusted, and I presume, therefore, that I may now receive the amount of your cheque. Will you, therefore, be so good as to order payment of it in town, and let me know where to apply?"

Mr. *Rufford* replied thus, on the 9th of *June* 1851:—"I beg to assure you that the points in discussion have not been adjusted, but quite the contrary. Mr. *Smith's* propositions are referred to Mr. *Brunel* to report to the Board upon them."

Subsequently to the receipt of the above letter, Mr. *Benbow* had various interviews with Mr. *Rufford*, and explained to him that the Earl of *Aberdeen* and Lord *Dunfermline*, acting under the will of the Earl of *Dudley*, had occasion for the 5500*l.*, and that he, Mr. *Benbow*, should therefore give directions for having the draft or order for 5500*l.* presented for payment. Mr. *Rufford*, however, requested that the draft should not be then presented, and told Mr. *Benbow* that if it were presented it would not be paid until after the deviation agreement should have been settled, but that when that was done Mr. *Rufford* would save Mr. *Benbow* the trouble of presenting it, as he, Mr. *Rufford*, would then give orders for payment of the amount to Mr. *Benbow*, by his *London* correspondents.

On the evening of the 26th of *June* 1851, the bank of Messrs. *Rufford & Wragge* closed, and was not afterwards opened, the bank having then stopped payment,  
 and

1852.  
 LORD WARD  
 v.  
 THE OXFORD  
 RAILWAY CO.

and a petition for adjudication of bankruptcy against Messrs. *Rufford & Wragge* was afterwards presented, and they were duly declared bankrupts.

The prayer of the present bill was for specific performance of the agreement of the 19th of *July* 1848, and payment of the 5500*l.* and interest.

By their answer the Defendants stated, that at a meeting, on the 26th of *March* 1851, of the Finance Committee of the Company, of which Mr. *Rufford* was a member, the committee were informed that the contractors were very urgent in requiring possession of the lands comprised in the 5625*l.* purchase, and that although the Company did not then require the lands comprised in the 5500*l.* purchase, the committee considered it not advisable to raise the question of strict right with persons in the position of the Plaintiffs, but resolved, in order to procure possession of the other land, to pay the two sums at once, as insisted on by the agents of the Plaintiffs, and that accordingly at that meeting of the Finance Committee, it was among other things ordered as follows :—“ That cheques be drawn on Messrs. *Rufford & Wragge* for land of Lord *Ward*, north of *Dudley*, 5500*l.*; for land of Lord *Ward* south of *Dudley*, 5625*l.*” The answer further stated, that it was the intention and meaning of the Finance Committee that the cheques should be forthwith paid to the Plaintiffs or their agents, for the purchase of the lands contracted to be purchased with the sums of 5625*l.* and 5500*l.*

That the cheques were delivered to Mr. *Rufford*, one of the makers thereof, in order that the same might be issued, applied, and paid in payment and satisfaction of the respective purchase-moneys. That it was not owing to any delay or negligence on the part of Mr. *Robins* that a formal agreement as to the 5500*l.* purchase was not executed

executed and exchanged before the 26th of *June* 1851, but that such delay arose solely on the part of Mr. *Maughan* and the other agents of the Plaintiffs.

1852.  
  
 LORD WARD  
 v.  
 THE OXFORD  
 RAILWAY Co.

That at a meeting of the Finance Committee on the 9th of *May* 1851, the subject of the cheques for 5625*l.* and 5500*l.* was discussed, and that their being outstanding was again much objected to; and that in consequence the following resolution was come to by the committee: "That the secretary be directed to produce at the next meeting of the committee, vouchers for the payment of the 11,125*l.* for Lord *Ward's* land."

That another meeting of the Finance Committee was held on the 14th of *May* 1851, and that at such meeting the contract for the purchase of the lands of the Plaintiffs so as aforesaid purchased with the sum of 5625*l.*, and also the letter of Mr. *Maughan's*, acknowledging the receipt of the cheque for 5500*l.*, were laid before the committee; and that the continuance of the 5500*l.* cheque outstanding, was considered unsatisfactory by the committee; and that it was resolved that Mr. *Ebenezer Robins* should be directed to complete an agreement for the purchase of the land north of *Dudley*, or to report immediately any difference that might exist thereon.

That at none of such meetings was the Finance Committee informed by Mr. *Rufford*, or by any other person, that Mr. *Rufford* or any other person had requested that the cheque for 5500*l.* should not be paid or presented for payment until such formal contract as in the bill in that behalf mentioned should have been entered into, or until the terms of the other contract in the bill particularly mentioned, and therein called the deviation contract, should be definitely arranged. That no authority was given by the Directors of the railway Company, or any person on their behalf to Mr. *Rufford*, or to any  
 other



tion of their dissatisfaction was a proof that they  
 red the money as still remaining at the risk of  
 mpany. But as the Company take the technical  
 on, that their own chairman had no authority even  
 late the time of payment of a cheque of which he  
 ie of the drawers, it cannot be a fair matter of  
 int that the Plaintiffs set one technicality against  
 r, and therefore (if necessary) we rely on the in-  
 y of the cheque, as not bearing upon the face of it  
 me of any place at which it was drawn. This de-  
 ndered it altogether void for want of a stamp :

IV. c. 49, s. 15 ; *Bopart v. Hicks (a)*, *Waters v.*  
*en (b)*, *Bond v. Warden (c)*, *Ruff v. Webb (d)*,  
*i v. Vysan (e)*, and *Cundy v. Marriott (f)*.

*Roupell*, Mr. *Lloyd*, and Mr. *W. Bovill*, for the  
 lants.

on the merits the case of the Defendants is clear.  
 er the chairman of the Company, nor the Finance  
 ittee, had any authority from the Company to  
 ne the payment of the cheque. And there is no  
 t from any one of them purporting to be made on  
 of the Company for that purpose. The verbal  
 unications between Mr. *Rufford* and Mr. *Benbow*  
 that can be relied upon as amounting to a request  
 to that effect. If Mr. *Benbow* thought fit, as  
 en himself and Mr. *Rufford*, who was one of the  
 rs on whom the cheque was drawn, to rely upon  
*ufford*, as he might have thought it safe to do, this is  
 eeding, with which, however the consequences of it  
 e lamented, the Company at large had nothing to  
 d by which those who act for them cannot permit  
 to be prejudiced. With regard to the objection

1852.  
 LORD WARD  
 v.  
 THE OXFORD  
 RAILWAY Co.

as

3 *Exch.* 1.

1 *Y. & J.* 457.

1 *Coll.* 583.

(d) 1 *Esp.* 129.

(e) 4 *Taunt.* 288.

(f) 1 *B. & Ad.* 696.

1852.  
 LORD WARD  
 v.  
 THE OXFORD  
 RAILWAY CO.

as to the stamp, even supposing that it would have been valid if it had been taken at the time, and could with propriety have been insisted upon, comes too late now after all parties have treated the cheque as good. The validity of the objection is, however, far from clear, for the heading of the cheque denotes sufficiently the place at which it was drawn.

*Mr. R. Palmer*, in reply, was stopped by the Court.


*The LORD JUSTICE KNIGHT BRUCE.*

This is a suit for specific performance instituted by landowners against a railway Company, who are alleged to have contracted to buy some land from them for a sum of 5500*l.*, and a small additional sum, as I understand, by way of compensation to the occupying tenants. The contract is not in dispute. There is but one question in controversy, namely, the question whether the main purchase-money (if I may use the expression), the sum of 5500*l.*, has or has not been paid? The Plaintiffs say that it has not been paid, but is wholly due. The Defendants say that it has been paid, or (which is the same thing) fully satisfied. That is the question which we are to decide.

The point came before the Master of the Rolls in the shape of a motion for an injunction, before the cause was ripe for hearing, and the Master of the Rolls then directed an action to be brought and tried at the last Summer Assizes, for the purpose of having the opinion of a jury and a judge at Nisi Prius upon the question of payment. With that order the Defendants were dissatisfied, contending, as I understand them, that the question was not a purely legal one, and that, whether there was legal payment or not, there was equitable satisfaction. The motion, by way of appeal from that order, was brought on before us in July last, and then it

was

was arranged that the cause should be brought to a state ready for hearing ;—that affidavits should be used instead of depositions upon interrogatories at the hearing, and (whether this was embodied in an order or not) that either party should be at liberty to examine any examinable persons orally, in anticipation of that change practically of the law, which had not then taken place, but which was to take place before the present time, and has now taken place. Accordingly, the cause has been brought before us upon the motion and upon the hearing, with such evidence as the parties respectively have chosen to produce, and with this circumstance, perhaps remarkable, that either party having the power of examining his adversary or himself (not indeed the corporation aggregate, but all its members and their clerk), and having the power of examining also any witnesses, each side has elected deliberately, that there should be no such examination, and must therefore be taken in effect to have informed us that there is no reasonable hope of obtaining better evidence applicable to the subject than is afforded by the actual materials before us.

1852.  
  
 LORD WARD  
 v.  
 THE OXFORD  
 RAILWAY Co.

In this state of things we are first to see whether an action is necessary to decide the legal question. Without at all dissenting from what the Master of the Rolls did, in the position and circumstances in which the case stood before him, the present position and the present circumstances are such as to enable us, I repeat without differing from him, to say as I say, and as I believe my learned Brother also will say, that upon the merely legal question there is no occasion for an action, but that we have sufficient materials before us to decide, and ought to decide, that alone which could be the subject of an action ; and the conclusion at which I have arrived upon these materials, and at which I have reason

tion, as I believe, of doing wrong on either side, but under reciprocal mistake and equal inattention or equal ignorance. On one side, it was intended to deliver a good cheque; on the other side, it was intended to receive a good cheque, whereas that which was delivered equally disappointed the intention and the desire of both; and there was no payment legally or equitably.

1852.  
  
 LORD WARD  
 v.  
 THE OXFORD  
 RAILWAY Co.

It has been said, however, that, by subsequent conduct, the vendors, either at law or in equity, have become precluded from saying that the purchase-money remains unpaid. Why? It cannot be said that they were bound to present a cheque which the bankers would not have been justified in paying. That would be to contradict all the cases.

It is argued and I will assume, without deciding, that they might have so acted with reference to it as to bind themselves. Although this is a question of law, I must also assume, for the purpose of this argument, that they can be fixed with a knowledge of their rights in the actual state of things; for a man cannot be said to intend to waive a right of which he is unconscious. The parties, it is said, went on dealing upon the notion that this was a good cheque. But how would that stand, even if this had been originally a valid cheque? It was delivered under an agreement admitted to be valid, that it should not be presented for a week. At the end of the week, conversations or correspondence took place upon the subject, and the result of those communications was, that a wish on the part of those who professed to act for the Company was expressed that the cheque should still be retained, and this was acceded to on the part of the holders of the cheque. Now the gentleman principally conducting these communications

D D D 2

on

*The* JUSTICE LORD CRANWORTH.

1852.

LORD WARD  
v.  
THE OXFORD  
RAILWAY Co.

I have come entirely to the same conclusion. I will assume, in the view that I take of it, that there was no objection as to the stamp, and that this was a perfectly valid cheque: that there had been a proper place stated, and that it was not within the provisions of the Stamp Acts at all, but a proper cheque to all intents and purposes. In this view I have come to the conclusion that the persons who drew that cheque, by their lawfully authorized agent, directed the holder of it, or at all events authorized the holder of it, not to present it until a given event should take place, which did not take place at all before the insolvency of the Bank. Now, that that is so, is abundantly clear, and would not be disputed, provided it be considered as established that Mr. *Rufford* was, in the dealings with respect to the cheque, the lawfully authorized agent of the Company. And the real question therefore is, whether, upon the evidence, he was such lawfully authorized agent.

Mr. *Rufford* was the Chairman of the Company. I do not mean to say that, in my opinion, the chairman of a Company would have necessarily, by virtue of his office, the power of binding the Company in a transaction of this sort; but he was not only the Chairman of the Company, he was an active member, probably much the most active member, of what is called the Finance Committee, that is, that body of the Company who had the management of their finances. The cheque in question was to be the payment for a piece of land that was to be purchased from Lord *Ward*. The Company wanted to get from Lord *Ward* another piece of land which they had contracted to purchase from him, and Lord *Ward*, and Lord *Ward's* trustees said: "You shall not have the one without paying for the other, you shall pay for both at once." The Company did not like this,

1852.  
LORD WARD  
v.  
THE OXFORD  
RAILWAY CO.

this, but the Finance Committee, in order to get the land, authorized the drawing, either by themselves or by persons who drew for them, and who the next day did actually draw, two cheques, the one for the land they wanted to have, the other for the land they did not then want to have, but without paying for which Lord *Ward* would not let them have the other. Having drawn the cheques, they intrusted them to Mr. *Rufford*, that he might do the best he could with them, with Lord *Ward* and his agents in the country. He sent Mr. *Davies* to ascertain whether Lord *Ward's* trustees would not let the Company have the one piece of land without paying for the other. Mr. *Davies* discussed the matter with Lord *Ward's* trustees, who refused. Thereupon Mr. *Davies* went to Mr. *Rufford*, a conversation took place between them, and Mr. *Rufford* told him to do the best he could. Mr. *Davies* went, and Lord *Ward's* trustees refusing to let the Company have the one piece of land without the other, he said that they should have both the cheques. Just as that was going on, and whilst the transaction was still pending, Mr. *Rufford* himself comes on the scene,—a discussion goes on, and although Mr. *Davies* had been the person who had entered into the negotiation, Mr. *Rufford* was evidently the main-spring who was moving it, and he enters into negotiations on the subject. The letter of *April* 26th was written, as I interpret it, at the instance of Mr. *Rufford*. There is some little obscurity about it, but I think that it must be taken to have been written at the instance of Mr. *Rufford*. It is not directed distinctly to Mr. *Rufford*, but to Mr. *Davies*, the agent. By it Mr. *Maughan*, the agent of Lord *Ward's* trustees, agrees that the cheque shall be held, and not presented for a week, in order to enable him in the meantime to obtain the completion of the agreement. The week elapses, and no agreement is entered into. At the end of the week, therefore,

therefore, the agent in the country of Lord *Ward*, remits to the agent of Lord *Ward* and of the trustees (Mr. *Benbow*) in *London*, the cheque in question. Negotiations are immediately opened again between Mr. *Rufford* and Mr. *Benbow*, and the substance of what Mr. *Rufford* then says to Mr. *Benbow*, is this : “ It will be a breach of good faith if you present that cheque yet ; the matters have not yet been completed ; there remain a great many more things to be done ; and I tell you that I assume you will retain that cheque,—we trust it with you,—we assume you will do so,—it will be a dishonourable act if you do not do so ; the week has past, and we have not yet been able to complete the matter—you must hold it until it is completed.” That is the substance of what passes.

1852.  
  
 LORD WARD  
 v.  
 THE OXFORD  
 RAILWAY Co.

Was Mr. *Rufford* in that acting *ultra vires*? For the purpose of the argument, I will assume that he was ; but he was taking on himself to act as agent for the Finance Committee, and even if he was acting *ultra vires* as the agent, doing something he was not competent to do, it was competent to the Committee to ratify it afterwards. And we have the most distinct evidence that in the course of about a fortnight afterwards, upon two meetings of the Committee, Mr. *Rufford* had communicated to them that he had authorized an extension of time, or rather had insisted on an extension of the time. We have that most distinctly established by the fact, that these gentlemen all of them make an affidavit, in which they state that the matter was discussed, and that the outstanding position of that cheque for 5500*l.* appeared to them to be very unsatisfactory. What is the meaning of being unsatisfactory? The drawer of a cheque may feel it very unsatisfactory that a cheque he has drawn shall be outstanding, if it is outstanding under circumstances that make him continue the liable person. It cannot be unsatisfactory if the cheque is altogether at  
the

1852.  
 LORD WARD  
 v.  
 THE OXFORD  
 RAILWAY CO.

the risk of the party to whom the cheque has been given. What could there be unsatisfactory in that? If the cheque were a cheque that had been delivered over under such circumstances to Lord *Ward's* trustees, that it was their duty to present it, and they did not present it, how could that be unsatisfactory to the Company? If the Bank remained solvent, the only consequence would be, that by the non-presentation of the cheque, the Company would remain to a larger amount in cash at the Bank than if it were presented. If the Bank became insolvent, then it would be the loss of Lord *Ward's* trustees, and not theirs; therefore it was a matter of perfect indifference to them. Not so if Mr. *Rufford* had communicated the truth to them, that the cheque was outstanding upon an engagement which he had entered into as their agent, that it should not be presented until something had been completed; then the resolution is intelligible. It appears to me to be abundantly clear, whether Mr. *Rufford* had authority *ab ante* or not, he must have communicated to his colleagues on the Finance Committee, the fact that he had directed Lord *Ward's* trustees not to present that cheque, and that they, by not interfering to find fault with that, ratified and adopted the act which he had so done.

Independently, therefore, of the circumstance adverted to by my learned Brother, which had also great weight with me, namely, that Mr. *Rufford* himself was one of the drawers of the cheque, and therefore might have, independently of his character of Chairman of the Company and member of the Finance Committee, authority to say, "Do not present it," it appears to me clear that the Company, represented in the Finance Committee by Mr. *Rufford*, directed Lord *Ward* and his trustees to deal with that cheque precisely in the way in which they did deal with it, by holding and not presenting it.

That



That being so, even if it were a cheque as to which there was no objection whatever in respect of stamp, it appears to me that there is no laches on the part of the holder of the cheque in not presenting it. It never has been paid, and consequently there has been no satisfaction.

1852.  
 LORD WARD.  
 v.  
 THE OXFORD  
 RAILWAY CO.

BLAKENEY v. DUFUR.

Nov. 11.

**T**HIS was an appeal from the decision of the Master of the Rolls, directing the Plaintiff to give security for the costs of the suit, and that in the meantime all proceedings in the suit should be stayed.


Before *The*  
 LORDS JUSTICES.

Where a Plaintiff, not being in public service, goes abroad pending a suit and remains there under such circumstances as to render it probable he will not be forthcoming when the Defendant may be entitled to call upon him to pay costs, the Court will direct him to give security for costs.

The bill was filed in *March* 1850, the Plaintiff then being resident at 19, *Queen's Road, Regent's Park, London*. Some time afterwards he went to lodge in *Jermyn Street, St. James's*, and subsequently he resided at *Chiswick*. In the meantime he presented a petition under the Bankrupt Law Consolidation Act, 1849, for an arrangement with his creditors. He was afterwards adjudicated a bankrupt, but the adjudication was annulled upon appeal, for want of trading (see *ante*, p. 246, *Ex parte Dufaur*). In *May* 1852 he left *England* for *Jersey*, where he arrived on the 3rd of *June*, and had resided there ever since. In opposition to the motion the Plaintiff's solicitor deposed that the Plaintiff had gone to *Jersey* on a visit to his sister, and that the deponent believed it not to be his intention to reside there permanently, for that the deponent had seen a letter written by the Plaintiff, in which he expressed his intention of shortly returning to *London*.

Mr.

not, within the meaning of the rule, and the answer to that question depends in each case upon the interpretation to be put upon the phrase "resident" or "permanently resident" abroad. If it is supposed that any case lays down this proposition, that a person is not to give security for costs, unless it is shown that he intends to end his days abroad, I should entirely dissent from such a decision. That is not the meaning of the rule. If a Plaintiff goes to reside abroad, under circumstances rendering it likely that he will remain abroad for such a length of time that there is no reasonable probability of his being forthcoming when the Defendant may be entitled to call upon him to pay costs in the suit, that is sufficient. A case of this sort is not to be dealt with by laying down a general rule; it is impossible to define satisfactorily what extent of stay abroad is necessary in every case to render the rule applicable. In the report of the case before Lord *Loughborough*, in *Hoby v. Hitchcock* (a), a gentleman having property in the *West Indies* had gone there, and the Lord Chancellor, inferring, I presume, that he had gone merely with the temporary object of seeing to his affairs, and intended shortly to return, refused to order security to be given. When I was a Judge at common law the Courts constantly refused to require security to be given where the absence abroad of the party appeared to be for a purpose only temporary. It is obvious that, considering the modern facilities for travelling, such orders, if made in those cases, would be a gross oppression. The party must intend to remain abroad permanently, or for so long a time as to render it improbable that he can return within the time when he is likely to be called upon for costs in the suit. If, for instance, it were shown that he had gone abroad for some object which would keep him there

1852.  
  
 BLAKENEY  
 v.  
 DUFABUR.

(a) 5 Ves. 699.

must deal with the facts of the case as we find them now. And who can now doubt that the Plaintiff went to reside in *Jersey*?

1852.  
BLAKENEY  
v.  
DUFABR.

*The* LORD JUSTICE KNIGHT BRUCE.

It is not suggested that this gentleman is or was in any public service, civil or military. He left *London* for *Jersey* in *May* last. He arrived there early in *June*; we are now in *November*, and there is no evidence that he has at any time since been in any other place. I am of opinion that, within the meaning of the rule, there has been a permanent change of residence to a place out of the jurisdiction. The appeal must be dismissed with costs.

BLANN v. BELL.

Nov. 12, 13.

**T**HIS was an appeal from a decree of the late Vice-Chancellor *Parker* (reported in 5 *De Gex* and *Smale*, 658). The following statement will be found sufficient for the purposes of this report.

Before *The*  
LORDS JUSTICES.

*Thomas Blann* the testator, by his will, after giving his residuary estate to trustees, directed them to stand possessed

1. A testator gave the residue of his freehold, copyhold, and leasehold estates and all other his estate and effects, upon

trust to pay the dividends and interest, rents, profits, and annual produce to *E. B.* for life, with remainders over. This residue consisted of leasehold property, canal and insurance shares, and Dutch bonds. Held, that the tenant for life was entitled to enjoy the leaseholds in specie, but not the shares or Dutch bonds.

2. Under a bequest of residue, upon trust to pay the dividends of 1500*l.* stock to *A.* for life, and after her death to divide the dividends equally between *B.* and *C.* and the survivor of them. Held (*dubitante* Lord Justice Knight Bruce) that the survivor only took an interest for life.

3. Where, after fully hearing a case before the Lords Justices, they differ and pronounce judgment, the decision below is affirmed. A rehearing before the full Court will not in general be directed.

and children of his said niece *Frances Rayner* share and share alike; and in case she should die without issue lawfully begotten who should live to attain the age of twenty-one years, then the trusts were declared to be from and after the decease of the survivor of them the said *Edith Blann* and *Frances Rayner* to pay to and divide among any child or children of *Edith Blann* by any future husband 4000*l.* as and when they should respectively attain the age of twenty-one.

1852.

*BLANN*  
v.  
*BELL.*

Other pecuniary legacies were given in the event of there being no children of the legatees for life who should live to attain vested interests; and then the will proceeded thus:—"And as to the residue and remainder of my estate, in the event of my said niece *Frances Rayner* dying without issue lawfully begotten, who shall live to attain the age of twenty-one years, then from and after the decease of the survivor of them the said *Edith Blann* and *Frances Rayner*, I direct my said trustees to divide such residue into two equal moieties or half parts, and to hold the same in trust for the following charities, and to be disposed of as follows." The testator then bequeathed one-half of "such residue" to the *Hertford Infirmary*, and the other half to the *Bath Infirmary*.

By the Master's report it appeared that the residuary personal estate consisted of three shares in the *Brecon* and *Abergavenny* Canal, sixty shares in the *Avon* and *Kennett* Canal, 193 bonds in the Dutch 2*l.* 10*s.* Stock, twenty shares in the Eagle Assurance Company, a leasehold messuage and a leasehold stream of water, and that the residuary real estate consisted of a corn mill and other hereditaments.

By the decree under appeal it was declared that the widow was entitled to a life interest only in the dividends

*Cooke* (a), were or were not correctly decided, this will, I think, certainly exhibits no intention to retain the property *in specie*. It would be dangerous to break down the general rule laid down in the case of *Howe v. Lord Dartmouth* (b) upon slight grounds. It would introduce uncertainty and difficulty in the administration of estates. Perhaps some of the cases have broken into the rule of *Howe v. Lord Dartmouth* upon grounds too slight; but upon this it is unnecessary to give an opinion. Certainly it lies upon those who assert that any portion of the property is not to be converted to show that. I am of opinion that it has not been shown here, except as to the leaseholds, and has been shown as to them in such a manner as not to lead to the inference that the same rule is therefore to apply to the other part of the personal estate. As to this question, I concur in the view taken by the Vice-Chancellor.

1852.  
BLANN  
v.  
BELL.

*The* LORD JUSTICE LORD CRANWORTH.

I am of the same opinion. *Primá facie* where the gift of residue is to a person for life, and then to others in succession, the rule laid down in *Howe v. Lord Dartmouth* is to be applied. There may be circumstances in a case which take it out of the general rule, but I find here no circumstances whatever to take any part of the property, except the leaseholds, out of the general rule. On the contrary, if the whole will were spelt, I think that we should find in it indications of an intention that the general rule should be adhered to. I do not however proceed upon that, but upon the absence of anything to withdraw the case from the operations of the general rule. Upon the other question we will hear the counsel for the Respondents.

Mr.

(a) 1 Coll. 498.

(b) 7 Ves. 137.

VOL. II.

E E E

D. M. G.

generally by this and other Courts, founded, I believe, on the old feudal law, that a devise of the rents and profits of real estate carries with it the property in the land. The same is the case, as pointed out by my learned Brother, as to that description of personal property called government stock, for there nothing exists but the right to receive the dividends. The rule, however, is not confined to a sum of stock, but applies equally to a sum of money. A gift of the dividends of 1000*l.* carries with it the capital sum of 1000*l.*

1852.

BLANN  
v.  
BELL.

The question is, whether the rule is applicable to the present case ; whether, in this case, the direction to pay the dividends to the wife and niece and the survivor indicates that the *corpus* of the fund is to be taken, or only the dividends for the life of the survivor. The rule is one which has been adopted for convenience, and ought not lightly to be departed from. I therefore, in *Humphrey v. Humphrey*, acted upon it, and should do so in every instance, unless there be something to show that the rule is inapplicable to the particular case. Here, I think, the rule would be improperly applied, for this reason. What is given to the two consists of dividends merely. What did the testator give to the two to take equally between them ? Clearly an interest in the dividends only, during their joint lives. The contention is, *that* the survivor is to take the capital. Why ? If the *two* take only the dividends during their joint lives that *must* be because the word “dividends” does not mean *corpus* but “interest” as distinguishable from *corpus*. What is the survivor to take ? Why only the same thing as the deceased co-legatee. She stands in her place as *on her* half, and takes only the same interest as she did, *namely*, a life interest. That appears to me the proper construction to be put upon this obscure clause ; but, as the question was a very reasonable one to bring before

1852.

BLANN  
v.  
BELL.

the Court, I think all the costs should be paid out of the capital stock.

*The* LORD JUSTICE KNIGHT BRUCE.

This appeal raised but two questions : one, the point of conversion :—On which we both delivered our opinions yesterday, in conformity with the view taken of that part of the will by the able and excellent Judge whose loss we all with so much reason deplore. Subsequent consideration has confirmed me in that view.

The other point is as to the meaning in this particular will of the passage relating to the 1500*l.* stock which, after the death of Mrs. *Twitchin*, directs the dividends to be paid in this way : “ I direct the dividends arising from the said sum of 1500*l.* 3*l.* per Cent. Reduced Bank Annuities to be equally divided between my said wife *Edith Blann* and my niece *Frances Rayner* and the survivor of them.” Sir *James Parker* held that these words ought not to be construed as giving an absolute interest in the 1500*l.* to the widow, who happened to survive both the preceding tenant for life and the niece, but only gave her an interest for her life. My learned Brother is of the same opinion, as he has just declared and explained. Since that is so, and that is the only other point of appeal, the total affirmance of the decree becomes necessary upon both points. As to this part of the decree, however, I have entertained very considerable doubt. Upon it my mind is not yet made up, and if it were material that my mind should be made up, I should have requested a postponement of the case for that purpose. It is not, however, material that it should, for the reason just stated, and for the further reason that my learned Brother is of opinion with me that the appeal being reasonable, all the costs should be paid out of the fund :  
therefore

therefore I do not think that I ought to delay the final disposal of the case.

1852.

BLANN  
v.  
BELL.

Mr. *Malins*.

As one of your Lordships has expressed a doubt upon one of the questions raised upon this appeal, perhaps the Appellant may be permitted to have the benefit of the judgment of the full Court, by the case being reheard there.

*The* LORD JUSTICE KNIGHT BRUCE.

The Legislature has declared that a difference of opinion here on an appeal shall amount to an affirmance, and I think that we should be contravening that provision by sanctioning this application.

*The* LORD JUSTICE LORD CRANWORTH.

I am of the same opinion. We have never sanctioned a rehearing before the full Court of any case in which we have given judgment. One or two cases of difficulty, as *Stanton's case* (a), the case of *Mrs. Cumming* (b), and *Lake v. Currie* (c), we have asked the Lord Chancellor to hear, but not after judgment was pronounced.

*The* LORD JUSTICE KNIGHT BRUCE.

For the present purpose you were entitled to assume dissent on my part from the decision under appeal; but in truth I have expressed doubt only, not dissent.

(a) 2 *De G. M. & G.* 214.

(b) *Ibid.* 537.

(c) 2 *De G. M. & G.* 536.



1852.

Nov. 15.

LOWES *v.* LOWES.LOWES *v.* IVES.

Before *The*  
LORDS JUSTICES.

Under the new practice an order to revive a creditor's suit may be made at the instance of a creditor to whom a debt is found due by the Master.

**T**HIS was a motion by way of appeal from a decision of Vice-Chancellor *Stuart*, refusing to make an order of revivor of a creditor's suit at the instance of the Appellant, who had been found by the Master to be a creditor of the testator. The Master's report had been confirmed.

Mr. *R. W. E. Forster*, in support of the motion, cited 15 & 16 *Vict.* c. 86, s. 52 (*a*).

**THEIR LORDSHIPS** held that the case came within the spirit if not within the letter of the Act, and made the order.

(*a*) See the section set out, *ante*, p. 221.

---

1852.

MARTIN v. PYCROFT.

July 5, 17.  
Nov. 13, 15,  
16, 25.

**T**HIS was an appeal from the dismissal, by the Vice-Chancellor *Parker*, of a claim seeking the specific performance of an agreement on the part of the Defendants to grant a lease to the Plaintiff.

Before *The*  
LORDS JUSTICES.

The claim stated that *James Pycroft*, and the Defendants *Joseph Pycroft* and *John Winter Pycroft*, became or claimed to have become seised or entitled in undivided third shares as tenants in common, under or by virtue of the will and codicils of *Elizabeth Pycroft*, who died on or about the 19th day of *December* 1840, of or to certain hereditaments, including the alehouse, messuage, and premises agreed to be demised as thereafter was stated, held under a lease for lives renewable, granted thereof to

1. Where persons sign a written agreement and there has been no fraud or mistake, the written agreement binds at law and in equity according to its terms, although verbally a provision was agreed to which has not been inserted in the document;

subject to this, that the Defendant in equity may call upon the Court to be neutral unless the Plaintiff will consent to the omitted term.

2. Where, therefore, the Defendants agreed in writing to grant a Plaintiff a lease at a specified rent and for a specified term, subject to the same covenants, clauses, and agreements as were contained in an expiring lease under which he then held the property, and the Plaintiff filed a claim for specific performance, stating the above agreement, and that it was further agreed that he should pay a premium of 200*l.*, which by his claim he offered to do. Held, reversing the Vice-Chancellor's decision, that this additional term did not render the Statute of Frauds a valid defence to the claim.

3. Other defences having been set up as to the agreement having been unduly obtained, on which no decision had been given below, but which failed on appeal. Held that, although the decree was one of reversal, the Defendants must pay the costs of a *vivâ voce* examination, rendered necessary by these defences before the Appeal Court, the examination taking the place of an issue.

4. Where intended lessors, in executing an agreement for a lease, acted partly upon a representation by the lessee as to what had taken place between their own solicitor and him in its preparation, and their attention was immediately afterwards directed to the point whether this representation was correct; but they took no step to question it for three years afterwards. Held, that the delay was strongly confirmatory of the fairness of the transaction.

5. *Quære*, if there is any such rule as that a successful Appellant shall in no case have his costs of the appeal from his opponent.

1852.  
 MARTIN  
 v.  
 PYCROFT.


the said *Elizabeth Pycroft*, by the Lord Bishop of *Chichester*, subject as to the said alehouse, messuage, and premises, so agreed to be demised as thereafter was mentioned, to an under-lease thereof granted to *Charles Calvert*, Esq., for a term of years which would expire on the 29th day of *September* 1852. That the Plaintiff was and had been for many years past in the occupation of the said alehouse, messuage, and premises agreed to be demised as thereafter mentioned, under or by virtue of an under-lease thereof granted to him by the said *Charles Calvert* for the term of twenty-one years from the 29th day of *September* 1838, except the last two days of such term, by indenture dated the 6th day of *April* 1832, and made between the said *Charles Calvert* of the one part, and the Plaintiff of the other part. That the defendants entered into the agreement in question which was as follows :—

“An agreement made and entered into this 1st day of *August* 1849, between *James Pycroft*, of *Ockbrook*, in the county of *Derby*, gentleman, *Joseph Pycroft*, of *Passall*, in the county of *Derby*, farmer, and *John Winter Pycroft*, of *Titbury*, in the county of *Stafford*, farmer, of the one part, and *William Martin* of the *Ship* alehouse, *Chichester-rents*, *Chancery-lane*, in the county *Middlesex*, licensed victualler, of the other part.

The said *James Pycroft*, *Joseph Pycroft*, and *John Winter Pycroft*, hereby severally agree with the said *William Martin*, at any time hereafter, at his request, costs, and charges, by a good and sufficient deed, to demise and lease the messuage or tenement known by the name of the *Ship* alehouse, together with the messuage or tenement adjoining thereto, formerly used as a coffee-house, both situate in *Chichester-rents* aforesaid, with the appurtenances thereto belonging, as the same are


now

now in the occupation of the said *William Martin*, for a term of twenty-one years wanting two days from the expiration of the lease under which the said *William Martin* now holds the same; namely, from the 27th day of *September* 1852, at the yearly rent of 70*l.*, payable quarterly, and under and subject to such and the same covenants, clauses, and agreements as are contained in the lease under which the said *William Martin* now holds the said premises. And the said *William Martin* hereby agrees with the said *James Pycroft*, *Joseph Pycroft*, and *John Winter Pycroft*, to accept such lease. And it is hereby agreed between the said parties that this agreement shall not be considered to operate as an actual demise."

1852.  
  
 MARTIN  
 v.  
 PYCROFT.

The claim further stated, that it was agreed between the parties, that the sum of 200*l.* should be paid by the Plaintiff to the said *James Pycroft*, *Joseph Pycroft*, and *John Winter Pycroft*, as a premium or consideration for the lease so agreed to be granted by them as aforesaid; and that on the 11th day of *February* 1851, the Plaintiff paid unto the said *Joseph Pycroft* the sum of 85*l.* on account of his one-third share of the premium or sum of 200*l.*; and the said *Joseph Pycroft*, by writing under his hand dated the 11th of *February* 1851, acknowledged that he had received the said sum of 35*l.* accordingly. The claim then stated the death of *James Pycroft* on the 22nd of *January* 1851, and his will, dated the 21st of *September* 1849, giving a power of sale of the said leasehold premises to the trustees of the will, with such consent as therein mentioned, and a declaration that a receipt of the trustee or trustees for the time being of the will should be a sufficient discharge for monies payable to them or him, under or by virtue of the will, and appointing *Henry Holmes*, one of the Defendants, his executor, together with two others who did not act. The claim was for a specific performance of the agreement,

lease contained usual covenants on the lessor's part, and a covenant that the lessee, his executors, administrators, or assigns, would, within one year from the 30th of *November* then last past, lay out and expend in well and substantially repairing the demised premises, and in permanent alterations and improvements the full sum of 200*l.*, under and subject to the inspection, approval, and value of the surveyor or surveyors to be appointed by the lessor, his executors, administrators, or assigns, or by the superior landlord; and would, if required, produce the bills and other vouchers to the lessor, his executors, administrators, or assigns, or to the superior landlord, to show that the 200*l.* had been duly laid out and expended accordingly. There was also a covenant by the lessee, that he would at all times, as often as occasion should require, buy of the lessor, his executors or administrators, either alone or with his or their partners in trade, or such other persons carrying on the trade of brewers, as the lessor, his executors, or administrators should appoint, all the porter to be sold and disposed of in the house, or drawn in the same for sale, and should not deal or contract with any other persons for any porter to be drawn for sale in the house; and also that in any under-lease, from the Plaintiff, there should be a covenant in the terms therein specified, being terms for the purchase of porter similar to those in the lessor's own covenants.

1852.  
  
 MARTIN  
 v.  
 PYCROFT.

The other circumstances of the case will be found stated in the judgments.

The Vice-Chancellor held that the Statute of Frauds was a sufficient defence, and dismissed the claim, but without costs (*a*).

Mr.


(*a*) His Honor said that he did not see how to get over the objection upon the Statute of Frauds. The agreement was

the additional term. The Plaintiff ought surely to be in a Court of equity in no worse position, because he in the first instance states the case fairly and completely, and spontaneously offers to do equity on his part. It is a mistake to say that the Statute of Frauds is a defence to the suit, for there is, in any view of the case, a written agreement complete in all its terms, and binding upon the parties at law. The only defence to the performance of the agreement, as it stands upon the written document, is one not arising at all upon the Statute of Frauds, but upon equitable principles. If therefore the agreement as it stands requires payment of the 200*l.* premium, there is an end to the defence on the statute. If it does not, the Plaintiff is willing to perform it, either as it stands, or with an addition which renders it more favourable to the Defendants.

They cited *Rex v. The Inhabitants of Scammonden* (a), *Jones v. Sheriffe* (b), *London and Birmingham Railway Company v. Winter* (c), *Pember v. Mathers* (d).

Mr. Bacon and Mr. W. R. Ellis, for the Respondents.

On no fair construction of the agreement can it be said to provide for the payment of 200*l.* The statement of the consideration is not a covenant or agreement. As, therefore, the written document does not represent what is admitted to have been the agreement between the parties, it is out of the case. A Court of equity, at all events, cannot act upon it for any purpose. It cannot enforce upon parties the performance of terms to which neither of them ever agreed. What then was the real agreement (if any)? None which, consistently with the Statute of Frauds, can be established or regarded. Suppose the positions of the parties were reversed, could the Defendants have enforced the actual agreement

1852.  
  
 MARTIN  
 v.  
 PYCROFT.


(a) 3 T. R. 474.

(b) 9 Mod. 88, cited.

(c) Cr. & Ph. 57.

(d) 1 Bro. C. C. 52.

Mr. *Calvert*, on the 6th of *April* 1832, by a deed of that date, in consideration of a premium of 200*l.*, demised the whole of the property to Mr. *William Martin*, the Plaintiff in this cause, for the term of twenty-one years, wanting two days, from *Michaelmas* 1831, if Miss *Pycroft* and *William West*, or either of them, should so long live, at the yearly rent of 70*l.*, and under certain covenants on the lessee's part, including covenants between the Plaintiff and Mr. *Calvert* substantially though not precisely agreeing with those between Mr. *Calvert* and Miss *Pycroft* contained in the lease of 1831.

1852.  
  
**MARTIN**  
*v.*  
**PYCROFT.**


The Plaintiff seems to have been ever since the lease of 1832, and to be still, the occupying tenant of the demised property under the lease. The cause has been argued, and the case treated upon the basis of both leases being still on foot, and we so consider them to be.

The estate and interest of Miss *Pycroft* seem to have become vested, at some time previous to *August* 1849, in three persons called *Joseph Pycroft*, *James Pycroft*, and *John Winter Pycroft*, of whom the first and the last are Defendants. *James Pycroft* being dead his interest is represented by the Defendant *Holmes*.

A document relating to this property was, in *August* 1849, signed by the Plaintiff, by the Defendant *Joseph Pycroft*, by *James Pycroft*, and by the Defendant *John Winter Pycroft*, in duplicate, the Plaintiff signing one part, the three others the other part. The paper thus signed was in these words. [His Lordship read it.]

The present suit is for the specific performance of this contract, a contract to which *ex facie* there seems no objection, nor has any objection but the two that I am about to state been suggested, one being that the Plaintiff

least if his case ought to be considered as free from fraud. The law prohibits generally, if not universally, the introduction of parol evidence to add to a written agreement, whether respecting or not respecting land, or to vary it. How can a man say that a written contract shall be deemed bad at law for omitting a term verbally agreed upon? We exclude cases of fraud.

1852.  
  
 MARTIN  
 v.  
 PYCROFT.


It is said, and probably with truth, that the three *Pycrofts*, if Plaintiffs, could not have compelled the actual Plaintiff as a Defendant to pay the premium of 200*l*. If it is so, this, we apprehend, does by no means dispose of the controversy. It happens not very infrequently that Plaintiffs obtain decrees for the specific performance of agreements, the specific performance of which could not have been compelled against them as Defendants. Here the actual Plaintiff, objecting to be subjected to either sum of 200*l*., would probably have barred himself from relief in equity. But he does not so object :—He has never so objected.

And our opinion is, that where persons sign a written agreement upon a subject, obnoxious or not obnoxious to the statute that has been so particularly referred to, and there has been no circumvention, no fraud, nor (in the sense in which the term “mistake” must be considered as used for this purpose) mistake, the written agreement binds at law and in equity, according to its terms, although verbally a provision was agreed to, which has not been inserted in the document; subject to this, that either of the parties, sued in equity upon it, may perhaps be entitled, in general, to ask the Court to be neutral, unless the Plaintiff will consent to the performance of the omitted term.

The present case appears to us to come within this  
 VOL. II.                      F F F                      D. M. G. rule;



The inquiry in this event must substantially be whether the signatures or signature of *James Pycroft* and *John Winter Pycroft*, or either of them, to the agreement were or was obtained by means of any and what untrue representation made by the Plaintiff, and also under what circumstances the agreement was signed by *James Pycroft* and *John Winter Pycroft* respectively. The possession must, pending the investigation, not be disturbed by the Defendants, the Plaintiff undertaking to abide by and perform any order respecting that possession, respecting rent, and otherwise respecting the property, which the Court may make. Of course all the deponents will be expressly made orally examinable generally, and the Master will be enabled to state any circumstances specially. But liberty may be taken to apply to prosecute the inquiry before us at a time when we shall clearly by law be enabled to take it; and the costs will be reserved.

1852.  
  
 MARTIN  
 v.  
 PYCROFT.

It was then arranged that the case should stand over till Michaelmas Term in order that witnesses might be examined orally before the Lords Justices.

Witnesses were examined *vivâ voce* on these days. The substance of their testimony is fully stated in the judgment.

Nov. 13, 15,  
 16.

Mr. *Daniel* and Mr. *Dauney* were for the Appellant.

Mr. *Montagu Chambers* and Mr. *W. R. Ellis*, for the Defendants.

Judgment reserved.

*The* LORD JUSTICE LORD CRANWORTH.

Nov. 25.

This was a claim by the Plaintiff *William Martin*, seeking against the Defendants *Joseph Pycroft*, *John*

F F F 2


*Winter*

The Defendants resisted the Plaintiff's claim on two grounds : first, as regards the Defendant *Joseph*, on the ground that he had been induced to sign it when he was in a state of intoxication, and, as regards *James Pycroft* and the Defendant *John Winter Pycroft*, on the ground that their signatures had been obtained by falsely representing to them that the terms of the agreement were fair towards them, and had been approved on their behalf by Mr. *Bischoff*, as the solicitor of *Joseph* and *John Winter Pycroft*, whereas in truth there had been no such approval ; secondly, the Defendants contended that the written agreement did not sufficiently embody all the terms contemplated by the parties, and so was void by reason of the Statute of Frauds.

The case was heard before Vice-Chancellor *Parker* in the month of *May* last, and that very learned Judge dismissed the claim on the latter ground, being of opinion that the Statute of Frauds presented an insuperable bar to the Plaintiff's claim, whatever might be the merits of the case on the facts, as to which he expressed no opinion.

The case then came before us by way of appeal, and was heard on the 5th day of *July* last. On the subject of the Statute of Frauds we took a different view from that which had presented itself to the Vice-Chancellor. We thought that the statute did not stand in the way of the Plaintiff's claim, and we fully explained the grounds on which our opinion was founded.

It therefore became necessary for us to inquire as to the grounds of defence arising out of the facts. That defence, so far as concerns the Defendants *John Winter Pycroft* and *Henry Holmes* is (as has been stated) founded on the alleged misrepresentations of the Plaintiff

1852.  
  
 MARTIN  
 v.  
 PYCROFT.

1852.  
MARTIN  
v.  
PYCROFT.


tiff as to the terms of the agreement being fair, and having been sanctioned by Mr. *Bischoff*.

On this part of the case we thought, and so stated, that if the matter were to be decided merely on the affidavits in the cause the Plaintiff was not entitled to relief. There appeared to us to be so much evidence in support of the alleged misrepresentation to *James Pycroft* and *John Winter Pycroft* that, without further inquiry, the Plaintiff's claim must be dismissed. But on such a point, evidence resting solely on affidavits was obviously very little to be relied on, and we therefore offered the Plaintiff either to take an inquiry on the subject of the alleged false representations, or, if it was preferred by both parties, we consented that the matter should stand over to the present Term, in order that it might then come on to be heard before us upon oral evidence, according to the new and very salutary alteration of the law introduced by the Act of last session. This latter course was preferred by the parties. Witnesses, including the parties themselves, have been examined *vivâ voce* before us, and we have now to decide the question of fact on the whole evidence in the cause, written as well as oral.

And first, as respects *Joseph*. His defence is, that when he signed the agreement he was in a state of intoxication and incapable of comprehending its meaning, and so, to adopt the language of his affidavit, that he never gave to it any intelligent assent. It is unnecessary for us to say whether, if we believed this allegation to be true, it would have afforded any valid defence, or whether the intoxication (if it existed) was to such an extent, or was so brought about as to entitle the Defendant to say, either that there was no agreement at all, or no agreement which this Court would enforce. We are  
clearly

clearly of opinion that there is no foundation whatever for the allegation. The Defendant *Joseph* appears to have been a man of very intemperate habits, and the Plaintiff being well aware of this, states, and as we believe truly states, that he took pains to find an occasion when *Joseph* was perfectly sober, in order that they might, while he was in that state, go together to the office of Mr. *Bischoff*, and there execute a proper agreement for a new lease of the public-house, to commence at the end of the then current term of twenty-one years. Such an occasion (according to the Plaintiff) occurred on the 1st of *August* 1849, and accordingly, at ten o'clock in the morning of that day, they proceeded together to the office of Mr. *Bischoff*, in *Colman-street*, and there found him reading his letters. Directions were given by Mr. *Bischoff* to his clerk, Mr. *Edwards*, to prepare the agreement pursuant to the instructions then given by the Plaintiff and *Joseph Pycroft*, and they were desired to return in the course of the day in order to sign it. The Plaintiff states that in order to insure the sobriety of *Joseph Pycroft*, between the time of this early visit to Mr. *Bischoff* and their return for the purpose of executing the agreement, he prevailed on him to go down the river with him to *Greenwich*; that they did so, and there took an early and perfectly temperate dinner, and then returned to *London* and went to the office of Mr. *Bischoff*. On arriving there they found that the agreement had been prepared in two parts, one to be executed by the Plaintiff and the other by the *Pycrofts*. Mr. *Edwards*, the clerk by whom it had been prepared, states that he believes it was then read over to *Joseph*, and the same thing is stated by the Plaintiff. Whether it was or was not read over is not very important, as it certainly was precisely conformable to the instructions given in the morning. *Joseph* then signed the agreement in the presence of Mr. *Edwards*, and the Plaintiff and

Mr.

1852.  
  
 MARTIN  
 v.  
 PYCROFT.


1852.  
MARTIN  
v.  
PYCROFT.

Mr. *Edwards* both say that *Joseph* was at that time, as also in the morning, perfectly sober. We have no doubt of the truth of what they so state.

We are therefore clearly of opinion that the alleged drunkenness of *Joseph*, when he signed the agreement, is not made out in fact, so that his ground of defence wholly fails.

The other Defendants, *J. W. Pycroft* and *H. Holmes*, resist the performance of the agreement on another ground. Their case is this : they say that *James Pycroft* (now deceased) and *J. W. Pycroft* were both of them ignorant of the value of the property, and therefore of the terms on which it would be reasonable to renew the Plaintiff's lease ; that the Plaintiff brought down into the country the agreement, after it had been signed by *Joseph*, and induced *James* and *J. W. Pycroft* to sign it, by stating that it had been prepared by Mr. *Bischoff* as the solicitor of *Joseph* and *J. W. Pycroft*, and that Mr. *Bischoff* had, on their behalf, sanctioned the proposed terms of renewal, as being fair towards the lessors. If the signatures of *James* and *J. W. Pycroft* were so obtained, this Court could not grant the Plaintiff any relief. But on full consideration of all the evidence in the cause, we are of opinion that the Defendants have failed in making out the case which they set up. We are satisfied that the renewal of the lease, on the same terms as those on which the lease of 1831 had been granted, had often formed the subject of conversation between the Plaintiff on one hand, and *James* and *J. W. Pycroft* on the other ; and though probably no positive promise had ever been made to the Plaintiff, yet we are persuaded that he had good reason to infer, from what had passed, that such a renewal, when asked for, would not be refused. There was nothing in this unnatural or unreasonable.


reasonable. Both *James* and *John W. Pycroft* were on the most friendly terms with the Plaintiff, and would certainly have been ready to render him any service, not materially interfering with their own interest. They were well satisfied with his conduct as tenant, and were often in the habit of living at his house for days and even weeks together when they came to *London*. They might well suppose that what were fair terms for a twenty-one years lease in 1831 would be so in 1852, and we are not at all satisfied that better terms could have been obtained. *J. W. Pycroft* had invited the Plaintiff to visit him in the country, and the circumstance therefore of the Plaintiff presenting himself at *Pessall Pits* in the month of *August* 1849, with the agreement already signed by *Joseph*, would not appear to the Defendant, *J. W. Pycroft*, extraordinary. The conduct of *J. W. Pycroft* on the occasion was very reasonable. He was a young man, of only twenty-five years of age. His uncle *James* was a man of nearly seventy, and was, or had been, a surveyor. It was, therefore, very natural that *John Winter Pycroft* should desire to have his uncle's sanction before he committed himself by signing the agreement, and accordingly he proposed to the Plaintiff that they should go together to *Ockbrook*, where *James* lived, and if his uncle agreed to sign the agreement then he would do the same, otherwise not. This course was accordingly taken, and the Plaintiff and *J. W. Pycroft*, either on the next day or the next day but one, went to *James* at *Ockbrook*.

1852.  
  
 MARTIN  
 v.  
 PYCROFT.

The material question is what passed when the three parties were there together. On the part of the Defendants it is said that the Plaintiff repeated what he had said at *Pessall Pitts*, and told *James* that he had brought down an agreement which had been prepared by Mr. *Bischoff* on behalf of the lessors or some of them, the  
 terms

half after the agreement was signed, and does not appear to have been then contemplated. *James* probably did rely on the Plaintiff and Mr. *Bischoff*, so far as to feel satisfied that they would not allow his brother to sign the paper while in a state of intoxication, and he might therefore not unreasonably think that he could hardly be doing wrong in following the same course as had been taken by *Joseph*. But, be that as it may, the conclusion at which we arrive on the evidence is that the Plaintiff practised no deception whatever, and that *James* signed the agreement either because he had satisfied himself that the terms were as favourable as he could obtain, or if not, then because he was willing to accede to the Plaintiff's wishes on the subject, without further inquiring whether he could or could not obtain better terms ; and the Defendant, *John Winter Pycroft*, evidently signed it because he was resolved to be guided by his uncle.

We must not quit the case without observing that the conduct of the parties, after *August* 1849, tends strongly to confirm the opinion we have formed as to what then took place. It is certain that, only a few hours after the execution of the agreement, *John Winter Pycroft* knew that the conduct of the Plaintiff in obtaining it was challenged by the Defendant *Holmes* ; and it can hardly be doubted that what then passed was communicated to *James*. The attention of *James* and *John W. Pycroft* was thus distinctly directed to the point, whether they had not been drawn in by the falsehood and misrepresentation of the Plaintiff to sign an agreement whereby their interest were materially prejudiced. And yet with their vigilance thus awakened, and with precisely the same information which the Defendants now possess, they not only made no complaint, but actually afterwards made several visits to town, staying at the house  
of

1852.  
  
 MARTIN  
 v.  
 PYCROFT.

1852.

WILTON v. HILL.

Nov. 12 & 25.

**T**HIS was a suit instituted by a married woman by a Mrs. *Ruth*, a widow, as her next friend. An original motion in the suit was now made by leave before this branch of the Court, that all further proceedings in the suit might be stayed until a new next friend was appointed; and, that if no responsible person could be found to act as next friend, the bill might be dismissed.

On the 20th of *July* a motion had been made before Vice-Chancellor *Kindersley*, on behalf of the Plaintiff, for the transfer into Court by the Defendants of a sum of stock admitted by the answer to be standing in their names. This motion was refused with costs, which had been taxed at 40*l.* 14*s.* In support of the present motion a witness (a clerk of the Defendant's solicitor) deposed to the service of a subpoena on the next friend, in *August* 1852, for payment of these costs. The deponent stated, that afterwards the next friend called upon him and entreated him not to take any further steps, stating that she was wholly unable to pay the costs, and was most anxious to be relieved from the responsibility which she had incurred in allowing her name to be used. This permission she said that she had given on the assurance that she would incur no liability and be put to no expense, and on a promise by her brother that he would give her a sum of money for allowing her name to be so used, a promise which he had never performed. The deponent further stated, that the result of this, and another interview which he had with Mrs. *Ruth* between the 14th and 21st of *August*, was that he consented to delay all further proceedings

Before *The*  
LORDS JUSTICES.

Where it appeared that the next friend of a *feme covert* Plaintiff was insolvent, and was in contempt for non-payment of costs, she was discharged from being next friend without prejudice to her liability already incurred; and all proceedings were stayed until a new and sufficient next friend should be appointed, or the Plaintiff should have obtained an order to sue in *formd pauperis* without a next friend.

An order may be made for payment of money into Court, although some of the persons interested in the money are not before the Court.

in



*The* LORD JUSTICE KNIGHT BRUCE said, that he had known orders made by Lord *Eldon* for bringing money into Court, although all the persons interested were not before it. And their Lordships made one order on both motions, discharging the order made by the Vice-Chancellor, and ordering Messrs. *Hill* and *Taylor*, two of the Defendants, to discharge the next friend from imprisonment for costs under that order; the costs on each side of the motion upon which that order was made, down to and including the day of making the Vice-Chancellor's order, being ordered to be costs in the cause. After directing the stock, admitted by the Defendant *Hill* to be standing in the joint names of himself and *Taylor* deceased, amounting to 1293*l.* 15*s.*, 3*l.* 5*s.* per Cent. Reduced Annuities, to be transferred into Court, and the dividends to be accumulated until further order, the order directed that Mrs. *Ruth* should be discharged from being the Plaintiff's next friend, but without prejudice to her liability to costs hitherto incurred. And all proceedings in the cause (except under the now stating order) were ordered to be stayed until a new and sufficient next friend should have been named and appointed, or the Plaintiff should have obtained liberty to proceed with her suit in *formá pauperis* without a next friend or until further order. But the order was expressed to be made without prejudice to the question, whether she was or would be entitled to obtain an order for liberty to proceed in *formá pauperis* without a next friend, and also without prejudice to any other question. The costs of both motions, except as aforesaid, were reserved.

1852.


WILTON

v.

HILL.

Nov. 25.

Court below. They referred to *Lethieullier v. Tracy* (a), *Ex parte Rogers* (b), *Crowder v. Clowes* (c), *Wainewright v. Wainewright* (d), *Harman v. Dickenson* (e), *Clarke v. Lubbock* (f), *Weakley v. Rugg* (g), *Blackwell v. Bull* (h), *Cockshott v. Cockshott* (i), and contended that *Andree v. Ward* (k), *Greene v. Ward* (l), *Ranelagh v. Ranelagh* (m), *Cooper v. Pitcher* (n), were distinguishable from the present case.

1852.  
  
 LEE  
 v.  
 BUSK.

Mr. *Bethell*, Mr. *Faber*, and Mr. *Greene*, for the Respondents, were not called upon.

*The* LORD JUSTICE KNIGHT BRUCE.

If this will is to be construed according to the rules of grammar and idiom, there is intestacy. It is therefore incumbent on those who allege that this is not a case of intestacy to show that from the whole of the will, and also (if the propositions are not the same) to show what is the particular course of devolution in which the property is to go. Now, assuming, for the purpose of the argument, that the will does exhibit an intention that, in the events which have occurred, there should not be an intestacy, we must then consider the question what is the gift which this will demonstrates, or which is to be implied from it. I confess that I find it impossible to say with anything like, I do not say certainty, but reasonable probability, whether the gift is to *John Lee* or to his children. In saying this, I do not wish, of course, to be understood as intimating

(a) 3 *Atk.* 784.

(b) 2 *Mad.* 449.

(c) 2 *Ves. jun.* 449.

(d) 3 *Ves.* 558.

(e) 1 *Bro. C. C.* 91.

(f) 1 *Y. & C. C. C.* 492.

(g) 7 *T. R.* 322.

(h) 1 *Keen*, 176.

(i) 2 *Coll.* 432.

(k) 1 *Russ.* 260.

(l) *Ib.* 262.

(m) 12 *Beav.* 200.

(n) 4 *Hare*, 485.

1852.

LEE  
v.  
BUSK.

intimating anything to prejudice the claim of the personal representatives of *John Lee*, if it should ever be made. Upon the present claim I find myself constrained to affirm the decision of the Master of the Rolls.

*The* LORD JUSTICE LORD CRANWORTH.

I am, though with reluctance, of the same opinion. I always doubted the case of *Ex parte Rogers*. It is reported by Mr. *Maddock*, not in its regular course, but in a note at the end of the volume, and I have never felt quite certain that upon investigation there might not turn out to be more in the case than appears on the face of the report. Assuming the report, however, to be perfectly accurate, still I do not think that it is an authority governing the present case; and for this reason, that the person, to whom in that case a life interest was given, survived the testator. That is quite sufficient to distinguish the two cases. I think the present a clear case of intestacy, but without meaning by that statement in any way to prejudice the case as against the personal representatives of *John Lee*.

Appeal dismissed. Costs out of the personal estate.

1852.

BRENAN v. PRESTON.

Dec. 2, 3, 4,  
13.

**T**HIS was an appeal from the refusal of a special injunction by Vice-Chancellor *Turner*.

The case made by the bill, and the affidavits in support of the motion, was as follows :—

The Plaintiffs, together with *Edmund Preston* and *Caleb David Watson*, who carried on business at *Liverpool*, under the firm of *Preston & Watson*, were the owners of a screw steam-ship called the *Phæbe*. *Edmund Preston* and *Caleb David Watson* were owners of twelve sixty-fourth parts or shares of the ship, and the Plaintiffs between them were owners of the remaining fifty-two sixty-fourths.

The Plaintiffs and Defendants became interested in the ship under the following agreement :—

Agreement

payment, by way of commission for themselves, in addition to the weekly sum payable by the terms of the charter-party. In the month of *May* following, the captain, who was a part owner, had a conversation with a clerk of the charterers, in which an observation of the latter led him to suspect that there was some underhand bargain ; but the subsequent part of the conversation removed the suspicion. In *October* he acquired correct knowledge of what had been done, and, together with the other part owners, except the ship's husbands, gave the ship's husbands notice of dismissal. The ship's husbands denied the right to dismiss them, and they possessed themselves of some of the machinery of the ship, which was at an engineer's for repairs. The other part owners thereupon filed a bill, and moved for an injunction to restrain the ship's husbands from interfering with her sailing by detention of the machinery, and for a receiver of the machinery,

Held, that the application was not too late ; and, on it appearing that a decree of possession could not be obtained in the Court of Admiralty, by reason of the Plaintiffs being in possession of the hull, or at all events could not be obtained in time to enable the vessel to fulfil her engagement : held, that the Court of Chancery had jurisdiction upon motion to appoint a receiver of the machinery, and to direct possession of it to be delivered to him ; and an order was made accordingly, the captain being appointed receiver *ad interim*.

Before *The*  
LORDS JUSTICES.

Upon the purchase of a steam-vessel, it was agreed among the purchasers that two of them should be the ship's husbands, and should not be removed except on certain grounds specified in the agreement. The ship's husbands thus appointed obtained a charter-party for her, and they privately stipulated for a weekly

the said steamer for all advances, with interest after the rate of 5*l.* per cent. per annum, made by them, or a lien upon the respective profit or balance due to each part owner. And also, in consideration of the premises, it is agreed, that, if any of the subscribing parties sell their shares, or a part thereof, except and subject to this agreement and provision for the continuance of the employment of *Preston & Watson* as ship's husbands and brokers, they shall pay the sum of 1500*l.* as and for compensation and liquidated damages,—the remuneration of ship's husbands and agents being understood to be 30*l.* per annum, British sterling, for keeping the ship's books, 5*l.* per cent. on all charters effected, or for loading the ship on the berth, 2*l.* 10*s.* per cent. on all inward freights. And the said subscribing parties hereto do hereby appoint *Patrick Phelan Brenan* as master of the said steamer, at 6*l.* 6*s.* per month, and 2*l.* 10*s.* per cent. on the freight. Wherever freight is mentioned in this agreement, it means gross freight and passage-money. The said *Patrick Phelan Brenan* also agrees to provide himself and crew with all provisions and stores, at 1*s.* 3*d.* per man per day, while actually employed, and 2*s.* 6*d.* extra per day, for not exceeding four officers, including the captain, while actually employed, and that he provides the passengers with everything necessary, for one-fourth of the passage-money. It being agreed for the security of the separate owners that *Patrick P. Brenan* hands the receipts for payment of all stores and other provisions to *Preston & Watson* the ship's husbands, each voyage, before sailing, failing in which *Preston & Watson* are hereby authorized to pay the amount, and *Patrick Phelan Brenan* binds himself to refund the same to them on demand, and also to remit to them all monies which he may receive abroad, merely deducting any sum positively necessary for ship's disbursements. Each of the subscribing owners bind themselves


1852.

BRENAN

v.

PRESTON.

and till the said steamer can be completed, and till the said several shares can be assigned over to the said *Preston & Watson* and the several persons, in manner aforesaid), that he will on request assign unto the said *Preston & Watson*, on behalf of themselves and the said several other persons whose names are hereunto subscribed, all his benefit, interest of and in the said contract dated the 24th day of *January* 1851, with the said *Alexander Denny & Brother* for building the intended steamer, for securing to the said *Preston & Watson* and the said several parties whose names are intended to be hereunto subscribed the repayment of the said several sums of money which the said *Preston & Watson*, and the several persons or any of them, may pay in manner and at the time aforesaid, with full power for the said *Preston & Watson* to proceed to enforce the said contract, and to exercise all the rights and powers in the name of the said *Patrick P. Brennan* in manner therein contained."

1852.  
  
 BRENNAN  
 v.  
 PRESTON.

The Defendants were employed in pursuance of this agreement as the brokers and agents, and ship's husbands for the ship; and the Defendants, as such agents and ship's husbands, on the 9th of *September* 1851, entered into a contract with Messrs. *Burns & McIver*, of *Liverpool*, to charter the ship at the rate of 134*l.* per week. It was, however, agreed between the Defendants and Messrs. *Burns & McIver* that the sum to be paid by *Burns & McIver* should be stated in the charter-party as 130*l.* per week only. Accordingly a charter-party was executed by the Defendants, as agents and ship's husbands, and Messrs. *Burns & McIver*, whereby it was expressed that the ship was chartered to Messrs. *Burns & McIver* for 130*l.* a week.

Messrs. *Burns & McIver* freighted the ship and  
 employed

*Burns & McIver*, which they have not credited to the said owners, do hereby express our decided and positive disapprobation in writing of such conduct, and in pursuance of the power in us vested by the agreement of the 20th of *February* 1851, we do find and declare such act a fraudulent one, and in direct contravention of the said agreement. And we do hereby, in further exercise of the said power, discontinue the services of the said *Preston & Watson* from henceforth, as agents or ship's husbands, or in any other capacity, and are ready and hereby offer to purchase the shares in the said vessel held by the said *Preston & Watson*, at such fair price as may be mutually agreed upon, which we hereby undertake forthwith to pay; and until some other agents or ship's husbands be appointed, we hereby authorize *Patrick P. Brennan*, the captain in command, to negotiate with Messrs. *Burns & McIver* for a renewal of or for a new charter, and in every way to act for the said owners in the chartering, employing, or managing the said vessel. Witness our hands, this 11th day of *October* 1852, *P. P. Brennan*, four-sixths; *Thomas Barnes*, one-sixteenth; *Patrick Keily*, one-sixteenth; *Phæbe Elizabeth Hough Watt*, five-sixteenths; *Alexander Denny*, two-sixteenths."


1852.  
BRENAN  
v.  
PRESTON.

The Defendants replied to this notice as follows :—

“ *Liverpool*, 19th *October* 1852.

“ Sir,—We are this moment in receipt of a Mr. *Arthur Smith's* letter of this date, containing your notice of the 11th instant, for which proceeding there is not the slightest ground. When we first effected the charter with Messrs. *Burns & McIver*, these gentlemen declined to give more than 130*l.* per week for the *Phæbe*, and stated they would not on any account sign a charter for more than that rate. We then endeavoured to get more  
money

at the engineer's, Mr. *Baker* of *Liverpool*, for the purpose of repair. The Defendants wrote to the engineer, requiring him to give the machinery up to them, which he accordingly did. On the production of the letter at the hearing of the appeal, it appeared, however, that to this application they described themselves as part owners only, not as ship's husbands.

1852.  
  
 BRENAN.  
 v.  
 PRESTON.

On the 22nd of *October*, the Plaintiffs' solicitor served on the Defendants a notice requiring them forthwith to restore the machinery to the captain, on board the vessel in the *Trafalgar Dock, Liverpool*. The notice further stated, as the fact was, that the vessel was under an engagement to sail from *Liverpool* on a voyage for *Constantinople*, on the 10th of *November*; and it informed the Defendants, that unless the machinery was restored before 11 o'clock in the forenoon of the 23rd of *October*, Capt. *Brenan* would procure new articles to be made for the vessel, to supply the place of those removed by the Defendants, and that the Defendants would be held liable for the whole costs, charges, and expenses thereof, and for all damages that might arise from the detention of the vessel, or otherwise in consequence of the machinery not being ready in time to enable the vessel to sail on the 10th day of *November*, according to her engagement.

The notice further stated, that six of the Plaintiffs, *Phæbe Elizabeth Watt, Patrick Phelan Brenan, Thomas Barnes, P. Keily, Alexander Denny, and Archibold Denny*, were prepared, in case the Defendants required the same, to give them the security in the Court of Admiralty, to the value of the Defendants' shares in the vessel, for her safe return from her intended voyage.

The bill and the affidavits in support of the motion  
 stated




In opposition to the motion, many affidavits were filed; and amongst others, an affidavit of *Charles Parry*, clerk to the Defendants, who deposed that on or about the month of *May* 1852, the Plaintiff, Capt. *Brenan*, was in the private office of the Defendants in *Warder-street, Liverpool*, examining the accounts of the steamer along with the Defendant *Watson*, and that the witness heard him say to Mr. *Watson*, “You have only charged commission up to the present time on the net amount of freight or charter-money per *Phæbe* ;” to which Mr. *Watson* replied, “We receive the difference of commission on *Phæbe’s* charter from the charterers.”

1852.  
BRENAN  
v.  
PRESTON.

Another affidavit was that of *William Wallace Bruce*, who deposed, that in the month of *May* 1852, Capt. *Brenan* said to him, “Are you aware of the fact of *Preston & Watson* having received a commission from *Burns & McIver* over and above the amount of freight?” to which the witness answered, “I know nothing about the charter or the commission ;” and that Capt. *Brenan* then said to him, that he knew for a fact that *Preston & Watson* had received an amount as commission from *Burns & McIver* over and above the charter-money.

In reply, Captain *Brenan* deposed, that the Defendant *Watson* never did, at any time previous to the 11th of *October* 1852, state to him that he, with *Preston* his partner, was in receipt of 4*l.* a week, or any other sum by way of commission or otherwise, from *Burns & McIver*, beyond or in addition to the 130*l.* He further deposed that he had read the copy affidavit of *William Wallace Bruce*, and admitted that the conversation therein stated, or something to the like effect, did take place about the time therein stated; but that the circumstances under which the conversation took place were as follows:—Some time previous to the conversation,

truth or groundlessness of the suspicions raised in his mind by Mr. *McAlister's* words, "*Watson* should be the last to object;" that those suspicions were removed by the statement of *Bruce* denying any knowledge of the fact of such over payment.

1852.  
  
 BRENNAN  
 v.  
 PRESTON.

The Vice-Chancellor refused the injunction, on the ground of delay. His Honor said, that on one side it was sworn positively there was the conversation in *May*, bringing knowledge to Capt. *Brenan*; and that, on the other side, there was not any distinct statement, Capt. *Brenan* merely stating that he did not recollect the terms of the conversation, and that, if the conversation did take place, it only raised a suspicion in his mind. His Honor thought that, upon this evidence, it was Capt. *Brenan's* duty to have brought forward the case in *May*, and that the Court would not be justified in interfering by injunction with the legal right, on evidence of this description.

Evidence was gone into after the decision of the Vice-Chancellor, with reference to the appeal, and, among other witnesses, Mr. *McAlister*, managing clerk of Messrs. *Burns & McIver* (who was mentioned in Capt. *Brenan's* affidavit), deposed that the circumstances under which the 130*l.* was accepted were the following, viz. :— There had been a previous meeting between Mr. *McIver*, the witness, and some of the owners of the *Phæbe*, as to terms of charter, but they were not then agreed upon, although 130*l.* per week had been named. Either on the same day, or subsequently, the Defendant *Watson* came to the office alone, and, after some little conversation between him and Mr. *McIver*, at which the witness was present, Mr. *Watson* said, "You shall have the vessel at 130*l.* a week," or to that effect. Something was then said by him respecting commission, to the following effect :

commission being paid by charterers of a ship to the parties chartering.

1852.

BRENNAN

v.

PRESTON.

The present motion by way of appeal was, that the Defendants might be restrained by injunction from further acting as ship's husbands, agents, or brokers of the ship *Phæbe* in the Plaintiffs' bill mentioned, and from preventing or interfering with the sale of the ship *Phæbe*, in fulfilment of the charter-party in the Plaintiffs' bill mentioned, to be made between the Plaintiffs and Messrs. *Burns & McIver*, in the bill also mentioned, either by withholding or retaining the portions of the machinery or otherwise. An original motion was also made by leave at the same time, that some proper person might be appointed as receiver of the ship, and the machinery and tackle, and other appurtenances, and to manage the ship, with proper directions in that behalf.

Mr. *Bethell*, Mr. *Follett*, and Mr. *W. M. James*, were for the Appellants.

Mr. *Rolt* and Mr. *Burnie*, for the Respondents.

The nature of the arguments appears sufficiently from the judgment.

*The* LORD JUSTICE KNIGHT BRUCE.

This case has been brought before us upon evidence of which part only was before the Vice-Chancellor, in whose Court originally it was. How, therefore, that learned judge would have dealt with the present materials we cannot be sure; but we have the best reason for believing that, had his mind been satisfied as to the point of delay or acquiescence, his decision upon those before him would have been in the Plaintiffs' favour, I mean, of course, so far as the motion in that Court

rality, the Defendants could be entitled to retain for their exclusive benefit the 4*l.* weekly for which they stipulated by the articles of 9th *September* 1851, connected with the charter-party of the same date. That sum was substantially part of the rent or hire of the vessel; and if the Defendants, reasonably or unreasonably, considered themselves as the ship's husbands, agents, or brokers, entitled to receive in respect of the charter or hiring to Messrs. *Burns & McIver*, a greater remuneration than 5*l.* per cent. on the weekly 130*l.*, it was incumbent on the Defendants, as between themselves and the Plaintiffs, to claim that greater remuneration, if at all, openly, directly, and in a straightforward manner. The Defendants could not possibly be justified in concealing or keeping back the weekly 4*l.*, or applying that money specifically for the purpose of that remuneration without the Plaintiffs' consent. That the Defendants' conduct was, in this respect, not open, not direct, not straightforward, not warrantable in any men intrusted as agents with the interests of others, and that it was therefore such as to justify the Plaintiffs in objecting to the continuance of the Defendants in the character or employment of ship's husbands, agents, or brokers, and in requiring them to cease from acting in any such capacity, we are for every present purpose satisfied.


1852.  
 BRENNAN  
*v.*  
 PRESTON.

But then comes the question of delay, or acquiescence. That any one of the Plaintiffs ever intended to give up his right to a participation in the weekly 4*l.* which originated this dispute, we see no reason for believing. As little reason do we see for believing that any damage or prejudice has been caused to the Defendants by any delay, if there was any, on the part of the Plaintiffs, or any one or more of them, in complaining of the Defendants' conduct, or in objecting to it. If the Plain-

H H H 2

tiffs,

longs to her; and having been repaired, or by an unjustifiable act on the Defendants' part prevented from being so, ought, we conceive, to be on board, the Plaintiffs so desiring. What right can the Defendants have to detain the machinery, both from the place where it was for the purpose of being repaired, and also from the vessel?

1852.  
  
 BRENNAN  
 v.  
 PRESTON.

It is not, however, at present clear to us, that if the Court of Admiralty would, at the instance of the Plaintiffs, interfere to compel the Defendants, either upon security to be given to them or otherwise, to deliver the machinery to the Plaintiffs, we ought now to interfere concerning it.

What we propose, therefore, to do is, to grant an injunction in the words of the first part of the original motion, and as to the residue of that motion and the whole of the additional motion, to let the case stand over, without prejudice to any question, and with liberty to apply, and to give the Plaintiffs leave to take such proceedings in the Court of Admiralty, with respect to the machinery or otherwise as they may be advised, and to direct the costs of the motion before the Vice-Chancellor to be costs in the cause, reserving all the costs before us.

The Plaintiffs' counsel may, however, by replying, convince us that we ought to make an order more beneficial to them; and we are, of course, ready to hear him, if he shall desire it.

*The LORD JUSTICE LORD CRANWORTH.*—I do not know whether it might be proper to state that we have reason to believe that the Court of Admiralty will interfere.

Mr. *Bethell*, in reply.

It is a question of jurisdiction. I am perfectly content

pelled the engineer to deliver it I don't know, but if he had delivered it he would have done a lawful act—they were entitled to the possession.

1852.  
BRENAN  
v.  
PRESTON.

The LORD JUSTICE KNIGHT BRUCE (after referring to the original letter, which was produced,) said :—They do not in that letter describe themselves as ship's husbands.

Mr. *Burnie*.—They subscribed themselves as *owners*.

Mr. *Bethell*.—Then, my Lords, supposing that to be so, there is but one remark that I will make, and if your Lordships feel a difficulty about it, I should not like to press it further. It appears to me to be a very material thing for the jurisdiction of this Court always to vindicate the rights of this Court, if put in motion on the ground of a case of fraud, to include within the compass of that suit, every other matter connected with the fraud, everything that forms a part of the case. If a dispute arises between the co-owners involving one point, and involving also the question of the management of the ship, and the first point is properly brought within the jurisdiction of the Court, the second point is open also. These persons being co-owners, and some of them claiming the right to act as ship's husbands, a right defeasible by proof of improper conduct, under and by virtue of the same instrument, creating that co-ownership, your Lordships have adjudicated that the complaint arising from the improper conduct has been properly brought here, and that, in respect thereof, it being a dispute between co-owners, you can interfere to put an end to certain of the co-owners acting as ship's husbands. But that dispute involves two things, not only the question who shall act as ship's husbands, but also the question touching the management and conduct of the ship, and both are in the cause; "because," say the Plaintiffs,

ing; and if it can do that at the hearing, in the meantime it can provide for the *ad interim* possession. That takes the second part of the notice of motion. The third part of the notice of motion is the receiver and manager of the ship. The ship is a matter in controversy, and in controversy in this way: the Defendants say that the ship cannot be sold without their availing themselves of the right of ship's husbands. If the Court could now make a final order touching the Defendants' being, or not being, ship's husbands, there would be difficulty in asking for an *interim* order touching the management of the ship; but if an interlocutory order can alone be made, there may be included in the *ad interim* order, the substitution of some person to be named by the Court to act in the capacity of ship's husbands. Where the Court takes away from a Defendant a certain power and authority, but does not at the same time delegate that power and authority to any other, the power and authority being essential for the preservation and use of the subject-matter in controversy, the interference by way of injunction would only in fact leave the property in the same unprotected state in which it originally was, unless the Court went on to appoint some person to fulfil the duties of the Defendants who were displaced by the *ad interim* order. It follows, therefore, from the mere fact of the order being made displacing the Defendants, being only an *ad interim* order, that the Court must, by virtue of the same authority, delegate to a nominee of its own the authority and power which, for the present, it takes away from the Defendants by the force of the order. Then the consequence is, that, applying both those principles, if there is reason to believe that at the hearing a decree will be made for restitution to the Plaintiffs of the machinery, the Court has a right to provide for the custody and use of that machinery in the meantime. If the Court

1852.

BRENAN  
v.  
PRESTON.

After this order had been made, an action was entered in the Court of Admiralty in the matter of the ship *Phæbe*, in a cause of possession, at the suit of the owners of fifty-two sixty-fourth parts of the vessel. The warrant issued on the 9th of *December*, and was served on the 10th of *December*; application was made on the same day for a monition against *Edmund Preston* and *Caleb David Watson*, to deliver up to the Marshal of the High Court of Admiralty, or his deputy or other officer to be named, such part of the machinery of the steam-engines of the barque or steam-vessel *Phæbe* as were removed from the vessel for the purpose of repair, and delivered for such purpose into the custody of *Thomas Baker*, engineer and boiler-maker, and which had since been obtained from him, by or at the instance of *Edmund Preston* and *Caleb David Watson*, owners of twelve sixty-fourth parts or shares of the said barque or vessel, and which still remained in the possession or custody, or under the power or control of them, *Edmund Preston* and *Caleb David Watson*, or either of them, or to show cause why the same should not be so delivered up to await the decree of the High Court of Admiralty, in a certain cause of possession of the said steam-barque or vessel *Phæbe*, then depending.

1852.  
BRENAN  
v.  
PRESTON.

The Court of Admiralty, however, refused to issue the monition sought, on the ground that it had no jurisdiction, because the majority of the owners, who were the parties applying for it, were in fact then in possession of the ship, and that therefore no suit, as to the possession, could be maintained by them in that Court for the recovery of the ship, or for any part of the machinery or tackle of her.

---

The case was consequently again placed in the paper to be spoken to upon an affidavit of the facts just stated, and upon

Dec. 13.



any chance of assuming a jurisdiction properly belonging alone to another Court.


1852.  
 BRENNAN  
 v.  
 PRESTON.

Application has now been made to the Court of Admiralty, and the matter appears to stand in one of these two positions—either that by reason of the possession of the hull by the Plaintiffs, that Court cannot interfere with respect to the machinery; or, that according to its constitution and forms relief cannot be given until a comparatively distant day, with respect to a subject which in its nature requires speedy remedy. Whichever of those views be the correct one, in my opinion this Court has jurisdiction. If it were merely a new equity—if this were a head of jurisdiction not shown and proved by experience to belong to the Court, we might possibly have felt it our duty to accede to the difficulty which Mr. *Rolt*, properly on his part, suggested. But the case is not so. It is an ancient head of the jurisdiction of this Court to interpose in aid of the jurisdiction of other Courts. I need scarcely refer to the manner in which it interferes with respect to executions under judgments at law—and with respect to suits in the Ecclesiastical Court, as to probate or administration, by appointing a receiver *pendente lite*. In other instances too of an analogous kind, this Court has usefully, and, I believe, from all time, so far as that expression may be used with reference to this subject, interposed. I am of opinion that, if the Court of Admiralty has jurisdiction, this is a case of that description.

But there is also before us, on the affidavit that has been produced this day on the part of the Defendants, and is to be filed, an additional proof, if additional proof were wanting, of breach of duty and abandonment of trust: namely, the withdrawing of the machinery from the place where it had been deposited for the purpose of repairs,

ceed before the Vice-Chancellor for that purpose accordingly. *Ad interim*, we ourselves immediately appoint Captain *Brenan* to be receiver and manager until the completion of the appointment of receiver and manager by the Vice-Chancellor, all the Plaintiffs undertaking that Captain *Brenan* shall faithfully execute the duties of that office, which will be equivalent to the security of each for Captain *Brenan*. And let the machinery be delivered to Captain *Brenan* as such interim receiver and manager within four days, he and the other Plaintiffs undertaking that, upon the completion of the appointment of receiver and manager by the Vice-Chancellor, the machinery shall be delivered to that receiver and manager, if the Court shall so order.

Mr. *Rolt* called the attention of the Court to the fact that all the Plaintiffs were out of the jurisdiction; and it was arranged that other security should be given, and the matter stood over for this to be settled.

1853.  
  
 BRENNAN  
 v.  
 PRESTON.

*Vines & William Hobbs*, as such copartners as afore-said, claimed to be due from *Thomas Newell* deceased, or from *William Shackell, Edward Vines, James Pither*, and *Mary Newell*, his executors in the petition named, or from the survivors or survivor of them, from the year 1811 to the year 1848 inclusive, and directed a reference to the Taxing Master to tax and settle the said bills.

1852.  
*Ex parte*  
 SHACKELL.

The circumstances which gave rise to the order and the petition, and the arguments upon the appeal, appear sufficiently from the judgment.

Mr. *Bethell* and Mr. *W. Morris* supported the appeal, and cited *Maddeford v. Austwick (a)*, *Horlock v. Smith (b)*.

Mr. *Follett* and Mr. *J. V. Prior*, for the Respondent, cited *Re Bignold (c)*, *Re Barker (d)*, and *Wilson v. Gutteridge (e)*.

The LORD JUSTICE KNIGHT BRUCE referred to the *Earl of Uxbridge's case (f)*.

Mr. *Selwyn* appeared for another party.

*Cur. adv. vult.*

The LORD JUSTICE LORD CRANWORTH, after reading the order under appeal, said :

Dec. 8.

The circumstances which gave rise to the order and petition

- |                                                |                               |
|------------------------------------------------|-------------------------------|
| (a) 3 <i>Myl. &amp; Cr.</i> 423.               | <i>W.</i> 110.                |
| (b) 2 <i>Myl. &amp; Cr.</i> 495.               | (d) 6 <i>Sim.</i> 476.        |
| (c) 9 <i>Beav.</i> 269 ; and see               | (e) 3 <i>B. &amp; C.</i> 157. |
| <i>Langford v. Mahony</i> , 4 <i>Dr. &amp;</i> | (f) 6 <i>Ves.</i> 425.        |

VOL. II.

I I I

D. M. G.

In obedience to this latter order, Messrs. *Vines & Hobbs*, on the 4th *November* 1851, delivered to Mrs. *Shackell* four bills of costs for business done by them for her late husband, three of them being for business done in various causes and matters in and after the year 1848, and the fourth being a small bill under 19*l.*, for business done principally in the year 1845 in reference to the executorship of Mrs. *Newell*, who had died in 1841. No separate bill was delivered by Mr. *Vines* alone, he not claiming any thing to be due to him separately.

1852.  
  
*Ex parte*  
 SHACKELL.

Mrs. *Shackell* was not satisfied with the four bills so delivered. She considered that she was entitled to have all the bills of costs for business done for Mr. *Newell* in his lifetime, and for his executors subsequently to his death, delivered and taxed, and she presented a petition to the Master of the Rolls, praying for an order to that effect; and on the hearing of that petition his Honor made the order now appealed from.

It is clear that the order, as drawn up, does not express what was intended by the Master of the Rolls. It merely orders the delivery of all bills of costs now claimed by Messrs *Vines & Hobbs* to be due to them, or by Mr. *Vines* to be due to him as executor of his father or in his own right, from *Thomas Newell* deceased, or from his executors, with directions for taxation and payment of these bills. In fact there are no such bills, except the four bills delivered under the order of the 2nd *October* 1851; for Messrs. *Vines & Hobbs* contend that all other bills have, either by specific payment or by the duly authorised application of money belonging to *Thomas Newell* in his lifetime or forming part of his estate after his death, been fully satisfied and discharged. The order, therefore, as drawn up, is obviously inoperative, and could not have been what the Petitioner, Mrs.

decided that, under the former statute of the 2 Geo. II. c. 23, there was no power to order taxation against the executor of a solicitor; and in *Maddeford v. Austwick* (a), Lord Cottenham points out the difficulty, not to say impossibility, of giving this summary relief against an executor, with a due regard to the rights of other creditors. Under the new statute, however, (commonly called Lord Langdale's Act,) the right is expressly given against the executor of a solicitor as well as against the solicitor himself; and assuming the statute to apply to the executor of a solicitor who had died before the passing of the Act, what we have to decide is, whether this is a case in which we ought to put the provisions of the statute into operation. We think not. This is not a case in which anything is claimed by or on behalf of the representatives of Mr. Vines, sen.; on the contrary, it is admitted by his executor that all his demands were fully settled in his lifetime. He has now been dead nearly twelve years, and has ceased to act as solicitor for above twenty years; and in addition to all this, there has been a decree in a suit instituted for the purpose of administering the estate of Mr. Newell, in which the executor of Mr. Vines, sen., has or might have been called on to account for all sums of money paid to or retained by him out of the assets of Mr. Newell in discharge of his bills of costs. Under these circumstances, in the absence of all proof of imposition or overcharge, we do not feel that we should be warranted in ordering the delivery or taxation of the bills of costs of Mr. Vines, sen., on the present petition. Our only jurisdiction as to these bills is that founded on the statute, and no sufficient case is made to justify us in its exercise.

The next class of bills consists of those which became due to the present Mr. Vines from the year 1831 up to

(a) 3 Myl. & Cr. 423.

1852.  
*Ex parte*  
 SHACKELL.

Now here the application has not been made until more than ten years after the last of such payments, and no reason is given for the delay, except such as suggests themselves from the relation in which the solicitor stood to the acting executor. This is certainly not enough to justify us in acting on this petition, upon which we have no jurisdiction so far as relates to this class of bills, except that derived from the statute; for it is not suggested that, during the period now in question, Mr. *Vines* possessed any part of the testator's assets or became accountable to the executors. We do not forget that the expression in *Clacey's* affidavit is that the bills in the lifetime of *Edward Vines* the father were all paid or *allowed in account*; but this does not vary the case. The bills were all properly made out and delivered. Specific receipts were given on each settlement. Under these circumstances, whether each bill was discharged by a specific payment, or by a credit given to the son by the father in any accounts subsisting between them, is not material: in either case there was payment of the definite ascertained amount of the bill. The mode of making the payment was mere matter of arrangement between the father and the son.

1852.  
*Ex parte*  
SHACKELL.

The only remaining bills are those, first of Mr. *Vines* and afterwards of Messrs. *Vines & Hobbs*, for the period subsequent to the death of Mr. *Vines* the father. There is no statement that those bills were ever delivered to the parties chargeable. *Clacey* indeed, says, in reference to some of them, that they were duly made out according to the custom of Messrs. *Vines & Hobbs'* office; but there is no evidence that when so made out they were ever delivered to Mr. *Shackell* the surviving executor, so that he might, if he had been minded so to do, have submitted them to the consideration of others.

Considerable

if anything, shall be found due to him or them respectively upon the taxation and accounts hereinafter directed, Let the said *Edward Vines* deliver to the said *Anne Shackell* his bills of costs for all business done by him alone, subsequent to the death of his father, for or on account of the said *William Shackell* and *Mary Newell*, or either of them, or otherwise for or on account of the estate of *Thomas Newell* deceased; and let the said *Edward Vines* & *William Hobbs* in like manner deliver to the said *Anne Shackell* their bill of costs for all business done by them, for or on account of the estate of the said *William Shackell* deceased, or otherwise for or on account of the estate of the said *Thomas Newell*, other than the business comprised in the four bills of costs already delivered. Discharge the three orders made by the Master of the Rolls, and let the four bills already delivered, and the bills to be delivered under this order, be referred to the Taxing Master for taxation, with all usual directions, save that the costs of taxation are to be reserved. Let the Master take an account of all sums of money paid to, or possessed or received by the said *Edward Vines* & *William Hobbs*, or either of them, since the decease of the said *Edward Vines* the father, in or towards the discharge of the said bills or any of them, or otherwise from or on account of the said *William Shackell* deceased, and the estate of the said *Thomas Newell*; and in taking such account let the Master make to the said *Edward Vines* & *William Hobbs* all just allowances; and let the Master ascertain what, on taking the said accounts, is due to or from the said *Edward Vines* & *William Hobbs*, or either of them; and in case he shall find any balance due from them or either of them, let the same be paid to the said *Anne Shackell* by the person or persons from whom the same shall be found due. Reserve the question of the costs

1852.

*Ex parte*  
SHACKELL.

down pipes and executing all other necessary and convenient works for supplying the town and neighbourhood of *Chorley* with water. In order to enable them to accomplish the objects for which they were thus incorporated, various powers were given to them of which those that are material are the following :

1852.  
 THE MAYOR  
 &C. OF  
 LIVERPOOL  
 v.  
 THE CHOR-  
 LEY WATER-  
 WORKS Co.

By the 19th section the Company has power to enter into or upon any lands waters and other places mentioned in the plan and book of reference deposited with the clerk of the peace, and to dig and break up the soil making satisfaction in manner in the Act mentioned to the persons interested.

By the 23rd section the Company are empowered from time to time to divert or alter the course of a brook or stream in *Anlezark Moor* shown and described in the plan and designated therein "brook" above a fall marked H on the plan, and to appropriate the same for the purposes of their undertaking ; and also to collect, obtain, divert and take and appropriate to the purposes of their undertaking all water, from all springs and streams and land or surface drainage, which would flow into or be intercepted by certain watercourses which were intended to be made by the Company and were to commence at and above the fall of the brook at the point marked H. They were to flow into or communicate with an intended reservoir situate in the township of *Anlezark* near a farm-house called the *Brook House* and thence to flow into and communicate with another intended reservoir situate in the townships of *Chorley* and *Heath Charnock* or one of them after leaving a sufficient supply of the water of such springs or streams for the use of the several estates in which the same should respectively arise or through which the same should respectively flow into the said watercourse or reservoirs.

The



and burgesses of *Liverpool* were empowered to purchase or to take on lease such of the lands streams and waters delineated on the plan and referred to in the book of reference therein mentioned as should be necessary for that purpose or any easement privilege power or authority in or over the same.

1852.  
 THE MAYOR  
 &C. OF  
 LIVERPOOL  
 v.  
 THE CHOR-  
 LEY WATER-  
 WORKS Co.

By the 52nd section of the *Liverpool* Act it was enacted that the *Liverpool* Corporation should cause to flow from and out of the reservoirs and other works by their Act authorized or from the feeders thereof for the supply of the several streams and places thereafter mentioned a quantity of water after the rate of not less than 7,500,000 gallons daily in the times and proportions specified in the Act and also that the before-mentioned quantities of water should be supplied in manner aforesaid before the corporation should be entitled to appropriate to the supply of the district included within the limits of the Act any of the waters of the brooks and streams which they were thereinbefore authorized to take.

The 73rd section recited that by the *Chorley* Waterworks Act 1846 the *Chorley* Company were empowered to lay pipes across certain lands intended to be taken for the purposes of the *Liverpool* Act. And that such pipes or a part thereof would be covered by the water of the *Anlezark* reservoir. And it enacted that nothing in the *Liverpool* Act contained should be construed to prevent the *Chorley* Company from laying such pipes in the manner in which the same might have been laid if the *Liverpool* Act had not been passed.

The present suit was instituted on the 31st of *August* 1852 by the Corporation of *Liverpool* against the *Chorley* Waterworks Company, and the case made by the bill was that the Plaintiffs, under the powers of their Act, and  
 of

The third ground of complaint was, that from a point B in the line of the projected tunnel or culvert to the reservoir the Defendants intended to quit the parliamentary limits and to convey the water by a short cut, not sanctioned by the Act.

1852.  
  
 THE MAYOR  
 &C. OF  
 LIVERPOOL  
 v.  
 THE CHOR-  
 LEY WATER-  
 WORKS Co.

It appeared that the watercourse authorized by the Defendants' Act must necessarily in its progress towards the Defendants' reservoir cross a small stream the water of which it must intercept at the point of intersection. The stream from which the water was authorized to be taken at point H was called in the bill the first brook, the other smaller intercepted stream was called the second brook. The latter stream, in its natural course, ran into the former, at a point much below H, and the two streams, so united, fell into the river *Yarrow*, from a lower point of which river the Plaintiffs' works were in part supplied.

The sole object of the Plaintiffs' bill was to obtain an injunction, restraining the Defendants from diverting the water from the first brook, at any point below point H, from conveying the water otherwise than by an open watercourse filled with broken stones and from conveying it by any channel, open or covered, without the limits authorized by their Act. There was however the usual prayer for general relief.

Soon after the filing of the bill a motion was made before Vice-chancellor *Kindersley*, in the long vacation, for an injunction, in the terms of the prayer of the bill, but his Honor refused the application, except as to the diversion of the water at a point below H.

The Plaintiffs, being dissatisfied with this limited injunction, gave a notice of motion, before the Lords Justices,

for the supply of the town and neighbourhood of *Chorley* with water, and, for that purpose, subject to certain restrictions and obligations, to divert the water of a particular stream, called the first brook, at a point, marked H on the plan deposited with the clerk of the peace for the county of Lancaster. And the Plaintiffs are, in like manner, authorized to draw off and appropriate water from (amongst other streams) the same stream, from which the Defendants are to derive their supply, taking it however at points, in that stream, lower than point H, at which the supply of the Defendants is to commence.

1852.  
THE MAYOR  
&C. OF  
LIVERPOOL  
v.  
THE CHOR-  
LEY WATER-  
WORKS CO.

With respect to two of the matters complained of, viz., 1st, the diversion of the water from a point in the stream, called the first brook, below the point marked H, and 2ndly, the making of a tunnel in a straight line from point B to point F, instead of keeping within the limits of deviation, shown on the plan, deposited with the clerk of the peace, there is no doubt but that the course, adopted or contemplated by the Defendants, is not authorized by their Act. By commencing their works at the point A, instead of point H, they were or would be, without authority, drawing off, from its natural course, water, of which, or of some part of which, the Plaintiffs, under the authority of their Act, have become or may become the purchasers. The injunction granted by Vice-Chancellor *Kindersley* restrains them from so prosecuting their works; and in this respect no complaint is made by either party of his Honor's order. The Defendants have, as we were told, abandoned all intention of acting in this respect otherwise than in precise conformity with the terms of the Act. The injunction will not impede them in the prosecution of their works, as they are now in course of progress. They have not asked to have it dissolved, and we see no

He must show, not only that the Defendants are committing or intend to commit a wrong, but also that the wrong, complained of, does occasion or will occasion loss or damage to him; that he has a special or private interest in confining the Defendants within the limits of their Parliamentary powers. Now in this respect the corporation of *Liverpool* appear to us to have failed. It is clear from the 23rd section of the Defendants' Act, that they may, at point H, divert the water of the stream and cause it by a proper channel to flow into their reservoir. The Plaintiffs have no interest whatever in the lands, through or over which the water may so be made to flow; and to them it must be matter of indifference, of no importance in any sense, whether it is carried by a longer or shorter line,—by an open channel or by a culvert,—by a course convenient, or inconvenient to the Defendants.

1852.  
THE MAYOR  
&C. OF  
LIVERPOOL  
v.  
THE CHOR-  
LEY WATER-  
WORKS Co.

The Plaintiffs put their case as to this part of it thus;—They assume that taking the Defendants' Act of Parliament, in connection with the plan, to which it refers, and which was deposited with the clerk of the peace, the Defendants were bound to adopt an open watercourse, as the method of conveying the water of the brook from point H to the reservoir. If an open watercourse is adopted, then, by a provision in the Act, that watercourse must be filled with broken stones. The descent, from point H to point G, a point marked, on the deposited plan, in the proposed course to the reservoir, a few hundred yards before reaching it, and there described as a descent of fifteen feet. The statement in the bill is thus:—

“That an open watercourse, such as that represented in the said plan to commence at or above the point H, and having an uniform declivity and a total fall of fifteen

K K K 2

feet

We must therefore understand the clause as imposing on the Defendants the duty, whenever they might make an open watercourse, of placing in it a quantity of broken stones, of which from the nature of the district there would probably be a ready supply, so as to make the broken fragments come to a level with the banks of the watercourse, but still so loosely as to allow the water to flow through the channel. To this extent we concur with the Plaintiffs in their construction of the section; but we do not agree with them in their conclusion, that a watercourse, so constructed, might not enable the Defendants to divert more than a small part of the water from point H. The power given to them by section 23 is to divert the water, that is all the water, from the stream at point H; and, as there is nothing in the Act to limit them as to the size of the watercourse, by which they are to abstract the water, either as to depth or width, it is obvious that, even assuming them to be bound to divert it by an open watercourse, they might, notwithstanding section 32, divert all the water, just as they might by a tunnel or culvert. If a square tunnel, whose sectional surface is a square foot, would be sufficient to carry off the whole of the water, it might require, to obtain the same result by means of a watercourse obstructed by broken stones, a sectional surface of ten or twenty square feet, but, with such an addition, the same result would be obtained.

It therefore seems to us that, even if the Plaintiffs are right in saying that the Act gives the Defendants no power of diverting the stream otherwise than by an open watercourse, filled up, (which we must interpret to mean partially filled up,) with broken stones, still they had physically as well as legally the means of diverting the whole of the water, flowing at point H, and conveying it to their reservoir.

1852.  
THE MAYOR  
&C. OF  
LIVERPOOL  
v.  
THE CHOR-  
LEY WATER-  
WORKS CO.

In

with the Plaintiffs that they are authorized to do this only by an open watercourse filled up according to the exigency of section 32, still such a watercourse, if made of sufficiently large dimensions, might carry off all the water of the stream, and so divert precisely the same quantity, as they are now proceeding to take by their tunnel. In this state of circumstances, we do not think that any case has been made, entitling the Plaintiffs to relief in this Court, beyond the continuance of the injunction already granted.


1852.  
 THE MAYOR  
 &C. OF  
 LIVERPOOL  
 v.  
 THE CHOR-  
 LEY WATER-  
 WORKS Co.

As to the tunnel from point B to the reservoir, the Defendants are certainly going beyond the limits of deviation, and so are doing what their Act does not authorize, and from point H to point B, where the proposed course is within the permitted limits, they are adopting a culvert or tunnel instead of an open watercourse, which for the present purpose, but for the present purpose only we assume not to be authorized by the Act. But neither of these unauthorized things is shown to be such as will occasion substantial loss or damage to the Plaintiffs, and therefore we do not think that, at their instance, we should be justified in interfering.

The order and decree to be made will therefore be simply, as to so much of the bill as seeks to restrain the Defendants from making any channel of communication with the first brook at any point lower than the point in the deposited plan marked H, to make the injunction perpetual. The rest of the bill must be dismissed, but without prejudice to the right of the Plaintiffs to bring any such action or actions as they may be advised. As the Plaintiffs have in part succeeded and in part failed we shall not give costs on either side.

It is hardly necessary for us to say, that this decree  
 is

The Plaintiffs were incorporated by the *Shrewsbury and Birmingham* Railway Act 1846, and obtained additional powers from Parliament by several subsequent Acts.

1852.  
  
 THE  
 SHREWSBURY  
 AND BIR-  
 MINGHAM  
 RAILWAY Co.  
 v.  
 THE STOUR  
 VALLEY  
 RAILWAY Co.

Their line, which extends from *Shrewsbury* to *Wolverhampton*, joins at *Wolverhampton* the *Birmingham, Wolverhampton*, and *Stour Valley* Railway (hereinafter called the *Stour Valley* Railway), which extends from *Wolverhampton* to *Birmingham*. The latter railway was constructed under the *Birmingham, Wolverhampton*, and *Stour Valley* Railway Act 1846 (*Birmingham, Wolverhampton*, and *Dudley* lines), and the *Birmingham, Wolverhampton*, and *Stour Valley* Railway Act 1847 (No. 1), (*Smethwick* deviation), the former of which Acts incorporated the *Stour Valley* Railway Company, and empowered that Company to construct the *Stour Valley* Railway.

By the *Stour Valley* Railway Company's Acts the Plaintiffs were authorized to subscribe one-fourth equal part of the share capital of that Company.

And by both Companies' Acts they had power to make their several railways as to parts thereof over the same land. These parts were situate between *New Mill Street*, in the town of *Wolverhampton*, and a road called the *Cannock Road*.

Under their powers, the Plaintiffs and the *Stour Valley* Railway Company each purchased separately, and took possession of portions of the property between the above street and road for the purposes of their respective railways; and in the result neither could complete  
 their


but that each should pay rates to the joint committee in respect of the use of the station by its own proper traffic.

In the years 1846, 1847, and 1848, the Plaintiffs subscribed one-fourth part of the capital of the *Stour Valley* Railway Company, being the sum of 200,000*l.*, which with the remaining three-fourths of the capital was laid out in the construction of the Railway.

By the above-mentioned *Stour Valley* Railway Act of 1847, the *Stour Valley* Railway Company were authorized to grant to the *London* and North Western Railway Company, who were thereby authorized to take and accept a lease of the *Stour Valley* Railway, upon such terms and conditions as should be mutually agreed upon between them.

The Plaintiffs opposed in Parliament this leasing clause, on the ground that it was unjust that the *Stour Valley* Railway, in which the Plaintiffs were shareholders to the extent of one-fourth of the whole capital, should be placed by means of a lease thereof under the exclusive control of the *London* and North Western Railway Company, who were the owners of a rival railway to the Plaintiff's line from *Wolverhampton* to *Shrewsbury* (via *Stafford* and independent of the *Stour Valley* line), and also because such exclusive control would enable the *London* and North Western Railway Company to exclude the Plaintiffs from a fair participation in the traffic between *Birmingham* on the one hand, and *Shrewsbury*, and *Chester*, and *Liverpool* on the other.

In consequence of this opposition, and as a consideration for its withdrawal, there was inserted in the *Stour Valley*

1852.  
  
 THE  
 SHREWSBURY  
 AND BIR-  
 MINGHAM  
 RAILWAY Co.  
 v.  
 THE STOUR  
 VALLEY  
 RAILWAY Co.



tered into between the *London* and North Western Railway Company and the Plaintiffs :—

1852.

THE  
SHREWSBURY  
AND BIR-  
MINGHAM  
RAILWAY Co.  
v.  
THE STOUR  
VALLEY  
RAILWAY Co.

“ Memorandum of an agreement between the *London* and North Western Company of the first part, and the *Shrewsbury* and *Birmingham* Railway of the second part.

“ 1. The agreement for the lease of the *Birmingham*, *Wolverhampton*, and *Stour Valley* Line, which has been already prepared, is to be carried into effect with regard to the main line, and the *Stourbridge* and other proposed extensions.

“ 2. The *Stour Valley* Company, and the *Shrewsbury* and *Birmingham* Company being jointly and equally interested in the *Wolverhampton* station, and the land required for the same, and the line up to the point of divergence hereinafter mentioned, it is now agreed that all questions between the two parties hereto as to the mode of acquiring, constructing, and using that station, and the line between that station, and the point of divergence of the *Stour Valley* Line to *Bushbury*, from the *Shrewsbury* Line, and the land necessary for the same, shall be settled by Mr. *Robert Stephenson*, between the parties. Each party paying one half of the necessary outlay, shall have the full use, jointly with the other party, of such station and line, and the works connected therewith.

“ 3. In case of difference, Mr. *Stephenson* shall also settle the terms of the deed of arrangement now proposed between the *Stour Valley* Company and the *Shrewsbury* and *Birmingham* Company, as to the said station, and the land required for the same.

“ 4. In

1852.

THE  
SHREWSBURY  
AND BIR-  
MINGHAM  
RAILWAY CO.  
v.  
THE STOUR  
VALLEY  
RAILWAY CO.

“4. In consideration of the above, and as a further consideration for the use of such station and line, the *London* and North Western Company will pay to the *Shrewsbury* and *Birmingham* Company a rent in perpetuity of £ .” The following note was appended to the original agreement:—“The amount of rent to be fixed by Mr. *Robert Stephenson*, upon the principle of giving the value of the difference between the amount of ordinary interest on 50,000*l.*, and interest under the *Stour Valley* terms of lease upon that sum.”

“5. The station and line to the point of divergence as aforesaid, to be under the management of a joint committee of three directors of each Company, who shall superintend the making the same, and fix upon such uniform rates for passengers and goods as shall, as nearly as can be estimated, leave after the payment of all maintenance and working expenses, for equal division between the *Shrewsbury* and *Birmingham*, and the *London* and North Western Companies, such annual amount as shall be equivalent to pay interest at not less than 6*l.* per cent. on the capital expended in the construction of the station, and the above portion of the line; and any difference of opinion in such joint committee shall, in case of need, be referred to the Commissioners of Railways, or an umpire to be appointed by them, the scale of rates above mentioned to be fixed by Mr. *Robert Stephenson*, forthwith, in case of difference, and to be variable according to the different classes of passengers and goods.

“6. The claim of the *Shrewsbury* and *Birmingham* Company against the *Stour Valley* Company, of 33,684*l.* 8*s.* 4*d.* for parliamentary expenses, is to be allowed and set off against calls due from the *Shrewsbury* and *Birmingham*

*mingham* Company. Dated the 10th day of *July* 1847."

1852.

THE  
SHREWSBURY  
AND BIR-  
MINGHAM  
RAILWAY Co.  
v.  
THE STOUR  
VALLEY  
RAILWAY Co.

In pursuance of this agreement, and of the *Stour Valley* Railway Act of 1847, a lease of the *Stour Valley* Railway was executed by the *Stour Valley* Railway Company, and the *London* and North Western Railway Company, under their respective seals, and was dated the 12th of *December* 1848.

On the 10th of *January* 1851, an agreement was entered into between the Great Western, the *Shrewsbury* and *Birmingham*, and the *Shrewsbury* and *Chester* Railway Companies, for giving facilities and preference to through traffic over each others' lines where they met. This agreement provided for the appointment of a joint committee of the directors of each of the three Companies for the purpose of fixing rates and managing such through traffic, and contained clauses for giving effect to its interchange.

On the 8th of *May* 1851, another agreement was entered into between the Great Western, the *Shrewsbury* and *Chester*, and the *Shrewsbury* and *Birmingham* Companies, whereby the three Companies agreed to apply to Parliament for leave to amalgamate in the year 1856, and for leave in the meantime for the Great Western Company to make up a certain dividend to the two other Companies out of a portion of its receipts, being the earnings from *London* through traffic.

On the 22nd of *November* 1851, the secretary of the *London* and North Western Railway Company wrote to the Plaintiff's secretary as follows :

" Sir,

" As the *Stour Valley* Line is about to be opened,  
I am

1852.  
 THE  
 SHREWSBURY  
 AND BIR-  
 MINGHAM  
 RAILWAY CO.  
 v.  
 THE STOUR  
 VALLEY  
 RAILWAY CO.


I am instructed to inform you, to prevent any misunderstanding, that the directors of this Company are advised that the event has happened upon which it is provided by the *Stour Valley* Act of 1847, that the special powers of using the line given to your Company by that Act should cease, and the directors will feel it their duty to act upon this advice. If your board should entertain any doubt as to the accuracy of this view, we shall be quite ready to concur with them in the measures necessary to decide the question in the most speedy and least expensive manner."

In *January* 1852, the Board of Trade, pursuant to a requisition on the part of the Plaintiffs, and of the *London* and North Western Railway Company, and *Stour Valley* Railway Company, appointed Sir *William Cubitt* as an umpire to decide all differences of opinion which might arise in the joint committee, in conformity with the terms of the agreement of the 10th of *July* 1847.

On the 1st of *July* 1852, the *Stour Valley* Railway was completed between *Birmingham* and *Wolverhampton* and opened for traffic.

By the "*Shrewsbury and Birmingham* Railway Company's Amendment Act, 1852," it was enacted, that it should be lawful for the *Shrewsbury and Birmingham* Railway Company to use for the accommodation of their traffic, the *London* and North Western Company's station, situated between *Worcester-street* and *Navigation-street* in *Birmingham*, subject to the provisions of the Act which authorized the making thereof, and also to pass over and use at all proper and reasonable times so much of the *London* and North Western Railway as lies between the above station and the line of the *Stour Valley* Railway, upon such terms and conditions as should be


be agreed upon and subject (both as regarded the station and railway) to the observance of the bye-laws, rules, and regulations of the *London* and North Western Railway Company, or in the event of the difference between the *Shrewsbury* and *Birmingham* Railway Company, and the *London* and North Western Railway Company, upon such terms and conditions, and subject to such bye-laws, rules, and regulations as might be settled by arbitration, the umpire being appointed by the Board of Trade.

1852.  
  
 THE  
 SHREWSBURY  
 AND BIR-  
 MINGHAM  
 RAILWAY Co.  
 v.  
 THE STOUR  
 VALLEY  
 RAILWAY Co.

By the 5th section, after reciting that by “The *Birmingham, Wolverhampton, and Stour Valley* Railway Act, 1847 (No. 1), *Smethwick* Deviation,” it was provided that the power thereby conferred on the *Shrewsbury* and *Birmingham* Railway Company should cease and be void, in case the said Company should be leased to, or purchased by, or amalgamated with the Great Western Railway Company, the *Oxford, Worcester, and Wolverhampton* Railway Company, and the *Birmingham, Wolverhampton, and Dudley* Railway Company, or with any or either of the said last-named Companies, it was enacted, that nothing in the now stating Act contained, should in any manner prejudice or affect the proviso for cesser in the said last-mentioned Act contained, and that the same and the cesser thereby provided for should extend to the powers thereinbefore conferred upon the *Shrewsbury* and *Birmingham* Railway Company, as well as to the powers conferred by the now stating Act.

The *Stour Valley* Railway Company, and the *London* and North Western Railway Company having obstructed the Plaintiffs in their use of the *Stour Valley* Line, and of the stations, the present bill was filed stating to the above effect, and further, that there was not any pretence, in point of law or equity, for alleging that any

from him directing the partition of the said station, although a partition was and is wholly contrary to the terms of the said agreements and Acts of Parliament. 88. That they have always, under the circumstances aforesaid, and both in writing and otherwise, and particularly by a memorandum in writing, dated the 13th of *April* 1852, the contents of which were and are true, protested against any partition, or attempt at partition. 89. That the question of a partition, even if a partition was practicable, which it is not, was and is wholly beyond the powers of the said Sir *William Cubitt*.

1852.  
  
 THE  
 SHREWSBURY  
 AND BIR-  
 MINGHAM  
 RAILWAY Co.  
 v.  
 THE STOUR  
 VALLEY  
 RAILWAY Co.

The prayer was for an injunction to restrain the Defendants, the *London* and North Western Railway Company, and the *Stour Valley* Railway Company, and each of them, and their and each of their directors, agents, and servants, from hindering and obstructing the Plaintiffs in the exercise of their aforesaid rights, and in particular from hindering or obstructing the use by the Plaintiffs of the *Stour Valley* Railway and of the stations and other conveniences connected therewith, or necessary for such use on the part of the Plaintiffs, the Plaintiffs being ready and willing and thereby offering to do all that ought to be done by them in respect of such user. It also sought an injunction to restrain the Defendants, their directors, agents, and servants, from obstructing the Plaintiffs in the occupation and management of the joint station at *Wolverhampton*.

The case made by the affidavits in opposition to the motion was in substance the following: that the Plaintiffs were, prior and up to the month of *January* 1851, on amicable terms with, and not opposed in interest to, the *London* and North Western Railway Company: that when the Plaintiffs' Acts and the *Stour Valley* Acts

L L L 2

were

1852.  
 THE  
 SHREWSBURY  
 AND BIR-  
 MINGHAM  
 RAILWAY Co.  
 v.  
 THE STOUB  
 VALLEY  
 RAILWAY Co.

were passed, it was intended that there should be a mutual interchange of traffic between their respective lines, and that neither Company should compete with the other for traffic between *Wolverhampton* and *Birmingham*, or for traffic between any place south of *Birmingham* and *Wolverhampton*, or any place north of *Wolverhampton*. But that in the month of *January* 1851, the Plaintiffs formed an alliance with the Great Western Railway Company, who were competing with the *London* and North Western Railway Company for traffic between *London* and *Birmingham* and *Wolverhampton*, and places north of *Wolverhampton*, and had entered into the above agreements or traffic arrangements with the Great Western and the *Shrewsbury* and *Chester* Railway Companies, whereby they had bound themselves to send all their traffic over the Great Western and the *Shrewsbury* and *Chester* lines of railway, in preference to sending it by the *London* and North Western Company's lines of railway, and that they had become and were in fact allied to, and united in interest with, the Great Western and the *Shrewsbury* and *Chester* Railway Companies, and consequently opposed to the Plaintiffs, the *London* and North Western Railway Company, with respect to whom the Plaintiffs and the said Great Western and *Shrewsbury* and *Chester* Railway Companies had become and were rival and competing Companies. That upon the occasion of the insertion of the twelfth clause in the Leasing Act, it was understood and agreed that such an alliance as had been now formed between the Plaintiffs, and the Great Western, and *Shrewsbury* and *Chester* Railway Companies, should be considered equivalent to an amalgamation of those Companies within the meaning of the clause, as the Defendants submitted it, in equity, was, even independently of any such understanding. In these circumstances, the Defendants admitted that they declined to permit the  
 Plaintiffs

Plaintiffs to use the *Stour Valley* line until the question had been determined by a Court of law or equity.

Upon the appeal motion coming on, it was arranged that the cause should be disposed of as if it had come to a hearing.

Mr. *Rolt*, Mr. *Hardy*, and Mr. *Giffard*, for the Appellants.

Mr. *Bethell* and Mr. *Speed*, for the Respondents.

The nature of the arguments sufficiently appears from the judgment.

The following cases were cited: *Duke of Bedford v. Trustees of the British Museum* (a), *Simpson v. Denison* (b), *Rochdale Canal Company v. King* (c). As to the necessity of a decision at law before the interference of the Court, the 61st and 62nd sections of the Chancery Amendment Act were referred to.

*The* LORD JUSTICE KNIGHT BRUCE.

This litigation may, for every practical purpose, be treated as produced by an allegation made and contention raised on the part of one or both of the Companies who are Defendants, that the power conferred on the Plaintiffs by the 12th section of an Act of Parliament, which received the royal assent on the 2nd of *July* 1847, and requires or authorizes itself to be called "The *Birmingham, Wolverhampton, and Stour Valley* Railway Act, 1847 (No. 1), *Smethwick* Deviation," had, under a proviso contained in that section, ceased and become void, it having been insisted that the Plaintiffs had, within the meaning of the words "leased," "purchased," and

1852.

THE  
SHREWSBURY  
AND BIR-  
MINGHAM  
RAILWAY Co.  
v.  
THE STOUR  
VALLEY  
RAILWAY Co.

Dec. 16.

(a) 2 *Myl. & K.* 552.

(b) 10 *Harc.* 51.

(c) 2 *Sim. N. S.* 78.



1852.  
 {  
 THE  
 SHREWSBURY  
 AND BIR-  
 MINGHAM  
 RAILWAY Co.  
 v.  
 THE STOUB  
 VALLEY  
 RAILWAY Co.

and “amalgamated,” as used in that section, with reference to the Plaintiffs or of one or two of those three words, been “leased,” or “purchased,” or “amalgamated,”—a predicament in which the Plaintiffs denied and still deny themselves to be, their opponents continuing to assert the contrary. The whole section runs thus:—


[His Lordship read it.]

This question is accordingly a material one in the cause. The Plaintiffs allege that it is a purely legal question, an assumption upon which their opponents say that it ought to be decided by some other Court than this, and that we ought not to act against them upon it, at any rate, until a judgment of some such other Court shall have been obtained against them concerning it;—the Plaintiffs denying that proposition.

We are of opinion that we have jurisdiction over the question, whether purely or not purely legal, and shall not be exceeding the limits of our functions by deciding it ourselves, without the judgment of another Court or any legal assistance; though, whether we ought so to exercise our judicial discretion as to do so, is a different point. But we conceive that we ought, in a case where the controversy and material facts are of such a nature, and so plain as the controversy and material facts here. We consider that the demands of justice and convenience will be best consulted by not seeking or waiting for a judgment in an action, as to this point, or troubling a Judge from another Court on the subject.

It appears to us impossible to maintain that there has been a leasing, or purchasing, or an amalgamating within the meaning of the proviso for cesser in the 12th section. The Plaintiffs have, we assume, associated, allied, connected

nected themselves with the Great Western Railway Company. But those terms and their meaning fall short, in our judgment, of the other three and their meaning. It may be, that an agreement to lease, to sell, or to amalgamate, as from a time past or present, would fall within the proviso, in the view, at least, of this Court. But we do not understand any such thing to have been done. Let it be assumed that there has been an agreement by the Plaintiffs that, at and from a future period, which will not arrive until some years hence, one of the three things shall take place or be done. Still, that has not brought, nor will before the period bring the Plaintiffs, we apprehend, into the predicament, in this respect, in which they are contended by their opponents to be.

1852.  
  
 THE  
 SHREWSBURY  
 AND BIR-  
 MINGHAM  
 RAILWAY Co.  
 v.  
 THE STOUE  
 VALLEY  
 RAILWAY Co.

The Companies Defendants have insisted, that, while the Act of 1847 was a bill passing through Parliament, (if such a form of expression may be used) it was understood and agreed by the agents of the three Companies respectively, that alliance, association, and connection should have the same effect, for the present purpose, as becoming leased, purchased, or amalgamated; and the Companies Defendants contend accordingly, that the Plaintiffs are bound by the understanding and agreement thus alleged. Upon the evidence, however, in the cause, as well as the rules by which Courts both of law and equity are guided, although this suggestion and contention proceed from Defendants, we are of opinion that, so far at least, there is no ground of opposition to what the Plaintiffs seek from the Court. It appears to us clear that, both at law and in equity, all the parties to this suit are bound by the actual language of the Act of Parliament of 1847, and, if the agreement of the same year is of any force, by that agreement also, as correctly expressing the whole intention and entire contract of the  
 three


1852.  
 THE  
 SHREWSBURY  
 AND BIR-  
 MINGHAM  
 RAILWAY Co.  
 v.  
 THE STOUR  
 VALLEY  
 RAILWAY Co.

three Companies, Plaintiffs and Defendants, on the subject under consideration, down to the 10th of *July* 1847.

For some time, one or both of us doubted whether, independently of the topics to which I have been advertising, there was not ground for holding, that since that day there had, through the conduct of the Plaintiffs, been such a change in their position relatively to the two Companies Defendants, as to render it inequitable for the Court to act at the Plaintiffs' instance on the 12th section. Upon full consideration, however, we have arrived at the conclusion that there is not sufficient room for the doubt, and that it would be an unsafe refinement, and a course not maintainable in point of principle, to give effect to it. We say this after having attended carefully to *The Duke of Bedford's case*, but without the least intention of intimating any opinion concerning that decision, which we assume to have been as correct as it was likely to be.

Then comes the question of the validity or invalidity, as against the Plaintiffs, of Sir *William Cubitt's* award, made some months after the filing of the bill, a question which has been treated on each side, and probably with propriety, as regularly before us. The Plaintiffs contend, and it has been, if not conceded, all but conceded, by the counsel for the Defendants opposed to them, that, against the Plaintiffs, the award cannot be maintained. We think so too; for, assuming that Sir *W. Cubitt* was well appointed referee, arbitrator, or umpire, which may not be clear, and that the award is sufficiently certain and final, which may at least be doubted, we apprehend that, in directing the partition or severance which he has directed, he has exceeded the limits of his authority, though doubtless with the best intentions. On the whole it cannot, we think, be unsafe or improper to discharge


charge the order, if any, by which that award has been made a rule or order of this Court, and to declare (for we have no doubt of the jurisdiction to declare), that, as against the Plaintiffs, it was and is void.

1852.  
  
 THE  
 SHREWSBURY  
 AND BIR-  
 MINGHAM  
 RAILWAY Co.  
 v.  
 THE STOUR  
 VALLEY  
 RAILWAY Co.

The possibility of directing in this suit without the Plaintiffs' consent, (which has been expressly refused,) a partition of the *Wolverhampton* station, whether in the manner adopted by the award or otherwise, appears to us to be excluded by the frame of the bill, (especially the 87th, 88th, and 89th paragraphs,) and the unquestioned facts of the case. We should otherwise, for the sake not only of the contending parties, but also of the limbs and luggage of the Queen's subjects, in the unenviable predicament of having occasion to move between *Shrewsbury* and *Birmingham*, along the line of battle, endeavour to find our way to make some sort of division. And on the same grounds, though the appointment of a receiver and manager has been asked neither by the bill nor at the bar, we should have been disposed, if possible, to make such an appointment. But we are not satisfied that it could be right for the Court to interfere in that manner with property and interests such as those which would be affected by such a measure.

Independently, then, of the award, independently of partition or severance in any way, and upon the principle of not appointing a receiver and manager, but upon the principle also of treating the Plaintiffs as still entitled to the benefit of the 12th section of the Act of 1847, what ought to be done respecting the obstructions of which the bill complains? And first, as to the *Wolverhampton* station, and the station between *Worcester-street* and *Navigation-street* in *Birmingham*, I mean the use of those stations respectively by the Plaintiffs jointly, or in common, with both or either of the Companies who

Chancery by way of injunction can be. And in our judgment the litigant parties ought, for the present at least, to be referred and left to them as concerns the stations in the circumstances that exist. If the Plaintiffs consider or shall consider themselves entitled to pecuniary compensation for any past or future wrongs, which cannot, except through a Court of justice be obtained, the Courts of law are and will be open to them.

1852.  
  
 THE  
 SHREWSBURY  
 AND BIR-  
 MINGHAM  
 RAILWAY Co.  
 v.  
 THE STOUR  
 VALLEY  
 RAILWAY Co.

And as to the use of any railways or railway, in the possession or under the control of the Companies who are Defendants, or either of them, I mean such use, by the Plaintiffs, as they seek under the Acts of 1847, 1849, and 1852, and the agreement of 1847, or any one or more of them, what I have said with respect to the two stations applies, we think, with equal or greater force to the whole question concerning that use.

Having said thus much, I may now proceed to state the order and decree, which in our opinion ought to be made on this occasion, premising that it seems to us at present not required by the merits on either side, that either should obtain any costs, and that though we decline granting any injunction at present, there may arise an occasion upon which, even in this suit as it stands, some injunction may be proper.

His Lordship proceeded to read the minutes of the decree. They declared the award of Sir *W. Cubitt* void as against the Plaintiffs. And it having been agreed on both sides that the award should be considered as having been made under an order of this Court, the award was to be deemed discharged as if such an order had been made. Then followed a declaration that the power conferred on the Plaintiffs by section 12 of the "*Birmingham, Wolverhampton, and Stour Valley Railway Amendment*

to avoid this, I ask you whether you will join Mr. *Stubbs* in a fresh note for 300*l.*, payable jointly and severally. As the notes in my possession are made payable on demand, and are not joint and several, you had better see your solicitor hereon immediately. I shall await your reply a post or two, and if I have no reply, I shall at once proceed against both of you."

1852.  
JONES  
v.  
BEACH.

Mr. *Beach's* solicitor replied as follows, by letter dated *Hereford, June 21st*: "Sir,—Mr. *Beach*, of this city, has brought me your letter, and has instructed me to inform you that it is his intention to pay off the 300*l.* due to your client on the joint note of himself and Mr. *Stubbs*. I shall be glad if you will let me know the amount due for interest; and Mr. *Beach* will be prepared to remit the money in the course of a post or two. I presume you have the notes."

It was arranged that the question of equitable, as distinguished from legal liability, should be argued first, and that the question of legal liability should be argued on the following day, when Mr. Justice *Maule* would attend to assist the Court in a bankruptcy case.

Mr. *J. H. Palmer*, for the Plaintiff.


If there is a several liability at law, there is also a several liability in equity. But even if there should be held to have been no several liability at law of the testator in his lifetime, still, in the administration of assets in this Court, his estate is liable, *Thorpe v. Jackson* (a). *Ex parte Kendall* (b).

[The LORD JUSTICE KNIGHT BRUCE referred to *Cowell v. Sikes* (c), *Rawstone v. Parr* (d).]

Mr.

- |                                                |                                            |
|------------------------------------------------|--------------------------------------------|
| (a) 2 <i>Y. &amp; C.</i> 553.                  | <i>S.</i> 347; <i>Crossley v. Dobson</i> , |
| (b) 17 <i>Ves.</i> 514.                        | <i>Ibid.</i> 486, and cases there cited.   |
| (c) 2 <i>Russ.</i> 191; and see                | (d) 3 <i>Russ.</i> 539.                    |
| <i>Wilmer v. Currey</i> , 2 <i>De G. &amp;</i> |                                            |

*Parr*, and that there is here no equitable liability distinct from the legal liability.

1852.  
  
 JONES  
 v.  
 BEACH.

*The* LORD JUSTICE LORD CRANWORTH.

I am of the same opinion, and for the same reason, viz. that the liability arises entirely upon the note. Without expressing any opinion as to *Thorpe v. Jackson*, I should have required more time to consider, before I assented to what is there laid down.

The case came on on this day before the Lords Justices, assisted by Mr. Justice *Maule*.

*Dec. 17.*

Mr. *J. H. Palmer*, for the Plaintiff.

The correspondence between the creditor and the surety's solicitor amounted to a new contract to change the joint liability of the surety and principal into a joint and separate liability, in consideration of the creditor forbearing to take proceedings which his letter expressed it to be his intention to take. He fulfilled his part of the contract, and is entitled to insist upon it against the surety's representatives. The consideration is sufficient; indeed, the moral obligation under the old contract would have supported the new one.

He referred to *Cocking v. Ward* (a).

[*The* LORD JUSTICE KNIGHT BRUCE referred to *Lee v. Muggeridge* (b).]

Mr. *Willcock*, for the Appellant.

There was no contract on the part of the creditor to forbear taking proceedings. Can it be said that what took place would have been a defence to an action by the creditor

(a) 1 *Com. B.* 858.

(b) 5 *Taunt.* 36.

is, whether the solicitor intended by what he said in his letter, to make any different contract from that already existing. If the letter of the 20th amounted to anything, it was a proposal of a new contract. But properly understood it does not, I think, amount to that. If, however, it was an offer, the offer was never accepted. If it had been accepted, there perhaps might have been a new contract. The solicitor's letter states what Mr. *Beach's* intention was, no doubt with the view of inducing the Plaintiff not to proceed so promptly. It admits the joint liability, and intimates an intention on the part of Mr. *Beach* to do what he might have been compelled to do. I think the meaning of it was, that the creditor need not bring a joint action, since it was Mr. *Beach's* intention to discharge his liability, he not wishing to be mixed up in an action with *Stubbs*. These letters do not appear to me to import any contract at all.

1852.

JONES

v.

BEACH.

Another and subsequent letter has been read by counsel, which, as far as I gathered its contents, seemed quite to confirm this view of the case, and to show that the parties did not consider that they were entering into any contract to transmute the joint into a several liability. I think that the estate of Mr. *Beach* is not chargeable.

*The* LORD JUSTICE KNIGHT BRUCE.

I am of opinion that neither Mr. *Beach* nor his attorney intended to vary, extend, or add to the liability under which Mr. *Beach* originally came. I agree with the opinion just delivered, that there is no separate debt.

*The* LORD JUSTICE LORD CRANWORTH.

I concur in every respect in the judgments which have been given. The appeal must be allowed.



partnership to the 21st of *October* 1848. By the same order, it was further ordered that the Defendant should be at liberty to lay before the Master any proposal for a compromise on payment of a fixed sum, instead of taking the accounts before directed; and if the Defendant should lay such proposal before the Master, then the Master was to inquire and state to the Court whether it would be for the benefit of *Olivia Mary Margaret Ostell*, the infant daughter of *Thomas Ostell* deceased, that such proposal should be accepted.

1852.  
  
 OSTELL  
 v.  
 LE PAGE.

The Master of the Supreme Court, by his report, dated the 17th of *May* 1852, certified that he had been attended by the attornies for the Complainant and for the Defendant respectively, and that the Defendant had laid before him a proposal for a compromise, on payment of a fixed sum (instead of taking the said accounts), that is to say, that the Defendant should purchase all the interest of the infant in the matters in dispute, for the sum of 63,842 rupees, 8 annas, and 11 pice. The report then set forth the details of the manner in which this amount was proposed to be secured and paid. The Master certified that he had heard and considered the evidence adduced before him in support of such proposal, and he found that, having regard to the nature of the partnership business, to the great delay and expense which must be incurred if the partnership accounts, from the commencement of the partnership in 1840 up to the termination thereof, were taken and the numerous items thereof proved and established in the usual way, and to the health and the pecuniary means of the Defendant; considering also from the account submitted to him that it was highly improbable that a larger sum than Company's 63,842 rupees, 8 annas, and 11 pice, would or could be realized out of the assets of the partnership on account of the infant's share and proportion therein,

M M M 2

besides

motion for the purpose of staying a suit, of which it is seised (if I may use the expression), by reason of a decree or judgment obtained in a foreign country, it ought to be well satisfied that the decree or judgment in the foreign country does justice, and covers the whole subject. There may be a stage of a cause at which the point may be a matter of indifference ; for there are instances in which a sentence, decree, or judgment is conclusive and not examinable by any other Court, however unjust it may be shown to be ; and there may be a period of this cause when it may be in vain to say that this Indian proceeding was unjust (if it was in fact unjust). But that time is not come. At present, for the purpose of an interlocutory motion, not only is my mind not satisfied that this decree was just ; not only is my mind not satisfied that it ought to bind ; but my mind is not satisfied also that it covers the whole matter in dispute between the litigant parties. Reserving, therefore, to the Defendant the fullest power of availing himself in the regular and ordinary way of this defence, it is not one of a nature to which, in my judgment, this Court can with safety listen for any effectual purpose on this occasion.

The order which I should propose to make would be this—to refuse the motion that was made before the Vice-Chancellor, without prejudice to any question, and to let the costs of the motion there and the motion here be costs in the cause.

*The* LORD JUSTICE LORD CRANWORTH.

I concur in the result at which my learned Brother has arrived.

I do not at all differ from the argument on the part of the Defendant, that if there has been in a foreign Court of competent jurisdiction a final adjudication upon  
the

1852.  
OSTELL  
v.  
LE PAGE.

1852.  
OSTELL  
v.  
LE PAGE.

the same matter between the same parties; and that matter, so adjudicated upon, is attempted to be renewed here between the same parties, it would be a good plea in bar to plead that final adjudication.

It is also the strong leaning of my opinion, that for this purpose Mr. *Molloy* did competently represent the present Plaintiff, and that, representing her, he had full authority from her, in the absence of fraud, not merely to conduct the litigation in the ordinary way, but to bind her by compromise. It has, I think, been decided that if a cause is proceeding, and the attorney at law chooses to refer it to arbitration, such an agreement binds his client. But it is another question, whether this Court will interfere in the manner now proposed upon motion. I do not mean to say that cases may not exist when the Court will so interfere. I think it would be very dangerous to repudiate such a jurisdiction, because the want of it might leave room for great oppression. But when the Court interferes upon motion to stop the Plaintiff from proceeding, it is taking upon itself a very delicate jurisdiction, and one in which it ought to see that by no possibility can it be doing injustice. Looking at this decree, and at the present bill, I think that the decree could not be pleaded so as to bar the Plaintiff from all the relief which she is seeking by the present suit.

Mr. *James* says very truly that, for the first twenty brief sheets of this bill, the statements are exactly the same as in the bill in the *Calcutta* suit. But the present bill, stating up to that point the same as was stated in the bill in *India*, and stating what the prayer was in *India*, goes on to state that after the proceedings had advanced far towards the decree in *India*, Mr. *Le Page* came to this country, and placed the management of the partnership

partnership concern in *Calcutta* in the hands of some agent whose name the Plaintiff is unable to discover, and by whom the same is now carried on for the joint benefit of the intestate's estate and of the Defendant;—that the same has been carried on since the 21st of *October* 1848, (up to which time alone the decree at *Calcutta* had any reference,) and still is carried on by means of capital and property belonging in part to the intestate's estate, and by the same capital and in the same manner since the last-mentioned day, and has not been carried on solely for the purpose of winding-up the same, but that divers purchases of stock have been made. And it charges that the same ought to be considered as still subsisting, and prays, among other things, for a dissolution of that as an existing partnership. The decree at *Calcutta* does not give and cannot affect to give any relief in respect of these matters.

1852.  
OSTELL  
v.  
LE PAGE.

It may be that the Defendant may have a perfectly good answer, either by way of plea or some other mode, as to so much as was adjudicated on in *Calcutta*; but the present order prevents the Plaintiff from obtaining relief on those matters as to which it is plain there has not been, and could not be, any adjudication in *Calcutta*. I think that the order was erroneous.

Order discharged without prejudice to  
any question. Costs reserved.

1852.

Dec. 22.

PIDCOCK *v.* BOULTBEE.

Before *The*  
LORDS JUSTICES.

A guardian to an infant Defendant of unsound mind, not so found by inquisition, should be appointed by the Court of Chancery, and not under the jurisdiction in lunacy.

**M**R. *W. H. TERRELL* applied, at the suggestion of Vice-Chancellor *Kindersley*, before their Lordships, under their jurisdiction in lunacy, on behalf of the Plaintiff, for the appointment of a guardian *ad litem* to an infant Defendant, who was a lunatic, but not so found by inquisition. Lord *Truro* had in another suit, in which the same infant was a party, made a similar order; and the Vice-Chancellor, without giving any opinion upon the point, considered under these circumstances that the application had better be made to the same jurisdiction.

Mr. *H. F. Bristowe* appeared for the other Defendants.

THEIR LORDSHIPS held that the application ought not to be made under the jurisdiction in lunacy, but might be made to the Vice-Chancellor.

1852.

BOWEN v. PRICE.

Dec. 21, 22.

**T**HIS was an application by way of appeal from the decision of Vice-Chancellor *Kindersley*, reported 1 *Drewry*, 307, holding service of an office copy of the interrogatories to the bill, by leaving it at the office of the solicitor of the Defendant, to be insufficient within the 15 & 16 *Vict.* c. 86, and the 17th and 18th orders of 7 *August* 1852.

Before *The*  
LORDS JUSTICES.

Delivery of a copy of the interrogatories to a bill by leaving it at the office of the Defendant's solicitor, without being served on the solicitor personally, held sufficient under the 12th section of the statute 15 & 16 *Vict.* c. 86.

Mr. *W. Morris* for the Plaintiff.

*The* LORD JUSTICE KNIGHT BRUCE said, that he should have thought service at the office of the solicitor sufficient, and that to hold the contrary might lead to inconvenience; as, for example, where the solicitor was ill in bed, or absent on the circuit.

*The* LORD JUSTICE LORD CRANWORTH was of the same opinion, and thought that as much inconvenience would be occasioned to one side as to the other, by requiring personal service.

THEIR LORDSHIPS, however, reserved the point for further consideration.

On this day their Lordships said that they remained of the same opinion, and that further application had better be made to the Vice-Chancellor.

Dec. 22.

Application was made accordingly to the Vice-Chancellor,

*William Bradshaw* had lately attained twenty-one, and now sought by a petition under the above Act to have his share transferred to him.

1852.  
*Ex parte*  
 BRADSHAW.

Mr. *Hetherington* supported the petition.

THEIR LORDSHIPS held the case to be within the 22nd section.

The order was made by the Vice-Chancellor on the 22nd of *December*, some additional evidence having in the meantime been obtained.

---

DAVENPORT *v.* STAFFORD.

*August 2.*

FRISBY *v.* STAFFORD.

CHARLESWORTH *v.* MANNERS.

THIS was an appeal from the decision of the Master of the Rolls, reported 14 *Beavan*, 328, where the circumstances of the case are fully stated.

Before *The*  
 LORDS JUSTICES.

One of the questions was as to the import and effect of the admission of assets, as recited in the original decree, set out at 8 *Beavan*, 504, which directed an account of the personal estate of *Edward Manners* come to the hands of *Ann Stafford*, and that what should have come to her hands should be answered by *Edward* and *Roger Manners*, they by their counsel admitting assets for that purpose.

By admitting assets, the executor of an executor renders himself liable to the same decree as the executor himself, if living, would have been liable to in respect of the personal estate of the original testator.

Mr. *Craig* and Mr. *Goodeve*, for the Appellants, adduced

1852.

BODENHAM v. HOSKYNs.

August 3.  
Nov. 3.

THIS was an appeal from a decision of Vice-Chancellor *Kindersley*.

Before *The*  
LORDS JUSTICES.


The Plaintiff was the owner of an estate in *Herefordshire*, called the *Rotherwas* estate. He employed Mr. *Parkes* (a Defendant) as his solicitor, and also as his receiver and agent in respect of this estate. Mr. *Parkes* had an account with Messrs. *Hoskyns* (other Defendants), who were bankers at *Hereford*. Upon his appointment as receiver, he opened another account with them for the purpose of placing to the credit of it the sums which he might receive in respect of the rents and profits of the *Rotherwas* estate; and what took place upon the occasion of this second account being opened was a subject of dispute, but it appeared that the account had been opened by a Mr. *Ward*, who was a clerk of Mr. *Parkes*, and Mr. *Ward's* evidence, which was wholly uncontradicted, was to the following effect.

A receiver of an estate, who had a private account at his bankers', opened another there, under the name of the estate, under such circumstances as to inform the bankers that the money which would be paid in to that account would belong to the owner of the estate. The receiver drew a cheque on the estate account and paid it into his private account. Held, that the bankers were liable to repay the amount to the owner of the estate.

In the month of *October* 1846, the witness was directed by Mr. *Parkes* to open an account for him with Messrs. *Hoskyns & Co.*, in the name of "The *Rotherwas* Estate Account;" and accordingly attended at the bank on the 26th of *October* 1846, and opened the said account by paying to the credit of it 700*l.* He saw there the then manager of the bank, to whom he addressed himself, but to the best of his recollection one of the Defendants (a partner in the bank) was also there, and near enough to hear what passed. The witness then stated to the manager, by Mr. *Parkes's* direction, that the account



terest, after the rate which the bankers allowed on the account. His Honor said, that whatever doubt might exist on Mr. *Parke's* evidence as to whether the bankers knew the nature of the account, Mr. *Ward's* evidence showed, that when the account was opened, the bankers were distinctly informed of the reason why it was kept as a separate account, and why the cheques were to be entitled with the words "The *Rotherwas* Account." It appeared to his Honor beyond all question, that from the commencement of that account the bankers knew that the monies paid in to that account were the monies of Mr. *Bodenham*, arising from the rents and profits of his *Rotherwas* estate, and that the account was kept by *Parke*, in his character of receiver.

1852.  
  
 BODENHAM  
 v.  
 HOSKYNB.

In these circumstances his Honor considered the question to be, whether the bankers had a right to say that the receiver could so deal with them as to appropriate his principal's money at any time to the discharge of his private debt to the bankers. Acquitting the bankers of any design of doing that which in their minds was dishonest or improper, all that his Honor imputed to them was, ignorance of the principles acted upon daily by a Court of equity, according to which a person who knows another to have in his hands or under his control monies belonging to a third person cannot deal with those monies for his own private benefit, when the effect of that transaction is the commission of a fraud on the owner (a).

From this decision the bankers appealed.

Mr. *Bethell* and Mr. *G. W. Collins*, for the Plaintiff, cited *Pannell v. Hurley* (b).

[The

(a) See the judgment and the facts of the case fully reported by Mr. *Gunning*, 21 *L. J.*, N. S. 867.  
 (b) 2 *Coll.* 241.

1852.

*Ex parte* WILLIAM MANDER SPARROW.

July 29.

In the Matter of RICHARD FOWKE, a Bankrupt.

THIS was a petition by way of appeal from the decision of Mr. Commissioner *Daniel*, disallowing the claim of a mortgagee of effects of the bankrupt to be entitled to the benefit of his security.

Before *The*  
LORDS JUSTICES.

A druggist assigned all the wares, fixtures, shop effects, stock in trade, furniture, goods, chattels, utensils, implements and things in, about, and belonging to the dwelling-house, warehouse, offices, and estate in his occupation by way of mortgage, to secure 150*l.* then advanced to him. The deed contained a proviso, that upon non-payment of the 150*l.*, or of the inter-

In the month of *May* 1849, the bankrupt applied to the Petitioner, to whom he was not then indebted, and with whom in fact he had had no previous transaction, for a loan of 150*l.*

At that time the bankrupt carried on business as a chemist and druggist at *Wolverhampton*, where he had been established for a considerable period ; and, so far as the Petitioner was aware, was not insolvent in his circumstances.

The loan was accordingly made on the security of an assignment, dated the 5th of *May* 1849, and made between the bankrupt of the one part and the Petitioner of the other part, whereby, in consideration of the sum of 150*l.* then lent and advanced by the Petitioner, the bankrupt

est, at the times mentioned in the deed, (but as to the interest after notice given,) the mortgagee might enter upon the premises, and, if necessary, break or force open the door of any place wherein the goods should be, and might sell the goods and pay the mortgage debt, interest, and costs. More than a year after the expiration of the time appointed for payment of the 150*l.* the mortgagee took possession. On the following day the mortgagor committed an act of bankruptcy, and was a few days afterwards adjudicated a bankrupt.

*Semble*, that the mortgagee was not entitled to retain the goods unless it appeared that the mortgagor had at the date of the mortgage other property.

The deed also declared that, after default should be made by the bankrupt, his executors or administrators, in payment of the said sum of 150*l.* and interest, in manner aforesaid, (and in respect of the said interest after notice should have been given to him his executors or administrators, or left for him or them at his or their usual place or places of abode, requiring the payment of such interest,) then it should be lawful for the Petitioner, his executors, administrators, or assigns, peaceably and quietly to receive and take possession of the goods, chattels, and premises thereby assigned, and for that purpose, if necessary, to break or force open any outer or inner door of the premises of the bankrupt, or any other house, shop, outbuilding, or place wherein the said goods, chattels, and premises, by that indenture assigned, were deposited and inclosed, without being liable to any indictment for forcible entry, or any other action, suit, or process of law, and afterwards to sell and dispose of the same for such price or prices as could be reasonably got for the same ; and thereout, in the first place, to retain to and reimburse himself and themselves, the Petitioner, his executors, administrators, or assigns, all costs, charges, and expenses which he or they might incur or be put unto, in and about making such sale or sales, and also in and about the receipt or recovery of the said sum of 150*l.* and interest respectively ; and, in the next place, to retain to and reimburse himself and themselves, the Petitioner, his executors, administrators, and assigns, the said sum of 150*l.* and interest thereon, or so much thereof as might then remain unpaid and unsatisfied ; and, from and after full payment and satisfaction of such costs, charges, and expenses as aforesaid, to render to and account for the surplus (if any) of the money arising from such sale or sales as aforesaid, unto the bankrupt, his executors, administrators or assigns.

1852.

*Ex parte*  
SPARROW.

1852.

*Ex parte*  
SPARROW.

On the 1st of *November* 1849, the bankrupt repaid to the Petitioner 50*l.* on account of the principal sum of 150*l.*; but no interest was at any time paid to the Petitioner, or any person on his behalf, by the bankrupt, nor did the Petitioner at any time give to the bankrupt any notice to pay the same, in pursuance of the power contained in the deed.

On the 1st of *December* 1851, the Appellant, under the power, took possession of the stock in trade, fixtures, and other effects, and continued from that time in possession, and had the entire control thereof until they were sold.

At that time the Appellant had no notice of any act of bankruptcy having been committed by the bankrupt, nor did it appear that any such act had been then committed by him; nor was it suggested that there had been any previous communication or intimation to the Appellant from the bankrupt, or any collusion or contrivance between them.

On the 2nd of *December* 1851, the act of bankruptcy, on which the adjudication proceeded, was committed by the bankrupt denying himself to a creditor. The Petition for adjudication was filed on the 3rd of the same month of *December*.

At the request of the Official Assignee the Appellant abstained from proceeding to a sale; and it was subsequently agreed between the Appellant and the assignees that the whole of the property, which had been taken possession of by the Appellant as above mentioned, should be sold by the assignees, and the proceeds of the sale should be paid into the hands of the Official Assignee, who undertook and agreed with the Appellant by a  
written

written undertaking to pay him the amount that was due to him at the time he took possession, provided the deed, under which he took possession, should be found to be valid.

1852.  
  
*Ex parte*  
 SPARROW.

The above state of facts was set forth in the petition, and not disputed.

The Commissioner held that the deed was fraudulent as against the assignees, and the present petition was an appeal from that decision.

Sir *W. P. Wood* and Mr. *De Gex* in support of the appeal.

As the Appellant took possession of the property before any act of bankruptcy had been committed the provision as to reputed ownership has no application to the case. The question therefore entirely depends upon the validity of the deed itself. Now the deed does not purport to be, and was not, an assignment of all the assignor's property. Even if it were, since more than a year had elapsed from the time of its execution to that of the petition for adjudication, it cannot under this adjudication be treated as an act of bankruptcy, and unless it can be so treated there is nothing to invalidate it. Moreover, it is now well settled that an assignment, even of all a trader's effects, for the full value in money actually paid, is in no case an act of bankruptcy, as it does not take away from the creditors any part of the bankrupt's property, but merely changes the state of it and renders it more available for the payment of debts: *Rose v. Haycock* (a), *Baxter v. Pritchard* (b), *Carr v. Burdiss* (c). The case of *Hassells v. Simpson* (d), on which

(a) 1 *A. & E.* 460, n.

(b) 1 *A. & E.* 456.

(c) 1 *C. M. & R.* 443.

(d) 1 *Douglass*, 89, n.

1852.  
 {  
*Ex parte*  
 SPARROW.

which the judgment of the Commissioner proceeded is different from these cases, and also from the present, for there the deed in question was a deed of indemnity to the grantee, which, from its nature, could not be considered as a mere change in the state of the grantor's assets. Moreover, the grantee's liability had been already incurred, and the deed was therefore merely voluntary.

[*The LORD JUSTICE KNIGHT BRUCE* referred to *Wedge v. Newlyn (a)*.]

In that case also no money was advanced, the security being for an antecedent debt.

[*The LORD JUSTICE KNIGHT BRUCE*. In *Barter v. Pritchard (b)* and *Rose v. Haycock (c)* the property was sold for its full value in money.]

The case of a mortgage is, we submit, stronger in favour of the person claiming under the deed, for there can, in that case, be no question of value. The whole of the property, except to the extent to which money is actually paid down, still belongs to the debtor, and can be made available by his general creditors. In *Lindon v. Sharp (d)*, which may be cited on the other side, Lord C. J. Tindal expressly adverts to the distinction between securities for present or future advances and those for "by-gone and pre-contracted debts."

*The LORD JUSTICE KNIGHT BRUCE* adverted to the provisions of the deed as being of a kind which allowed  
 the

(a) 4 B. & Ad. 831.

(b) 1 A. & E. 456.

(c) *Ibid.* 460, n.

(d) 6 M. & Gr. 906.

the mortgagor to retain the property in his possession, and yet permitted the mortgagee at any moment to withdraw the whole of it from the general creditors of the bankrupt, and to dispose of it as he might think fit. His Lordship expressed great doubt as to the validity of such provisions, unless the assignor had substantially other property besides that comprised in the deed, or was in solvent circumstances independently of that property.

1852.  
*Ex parte*  
 SPARROW.

Upon the Court asking the Appellant's counsel whether they desired an opportunity of adducing evidence on this point, they requested to have that opportunity, and the case stood over, and was ultimately compromised.

Mr. *Daniel* and Mr. *Bird* appeared for the Assignees.

See *Chase v. Goble*, 2 M. 8 *Exch.* 221; *Hutton v. Crutt-*  
*& Gr.* 930; *Young v. Ward well*, 1 *Ellis & Black.* 15.

---

1852.

Nov. 8.

*Ex parte* JAMES LUND COPELAND.

In the Matter of JAMES LUND COPELAND,  
a Bankrupt.

Before *The*  
LORDS JUSTICES.

Where all the calls upon the shares in a railway Company had been made, and a resolution had been passed that such of the shares as had been paid up should be converted into stock; Held that they were stock within the meaning of the 20th section of the Bankrupt Law Consolidation Act, denying a certificate to a bankrupt who has lost

200*l.* within the year preceding the petition for adjudication upon a contract (not to be completed within a week) for the purchase of stock.

*Semble*, that the shares would have been within the meaning of the section even if they had not been converted into stock.

Although the words in the section are "a contract," a loss of the prescribed amount, arising upon an aggregate of contracts during the year, falls within its meaning.

In calculating the amount of loss, sums paid by way of commission upon continuations are to be included.

The time of the resale is that of the loss.

A repealed statute *in pari materia* with an existing one may properly be referred to for the purpose of construing the latter.

THIS was the appeal of the bankrupt from the decision of the Commissioner, refusing to grant the Appellant his certificate of conformity, under the 20th section of the Bankrupt Law Consolidation Act 1849, which provides that no bankrupt shall be entitled to his certificate, if he shall "within one year next preceding the issuing of the fiat or the filing of such petition (*a*), have lost 200*l.* by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract."

On the 27th of *February* 1851, the bankrupt contracted for the purchase (at a time more than a week after the contract) of sixty shares in the *Manchester, Sheffield, and Lincolnshire* Railway Company, upon which 100*l.* had been paid up. At a half-yearly meeting of the shareholders of that Company, held in

*February*

(*a*) *Viz.*, the petition for adjudication.



*February* 1850, a resolution had been passed, to the effect that agreeably to the Act of Incorporation of the Company, and the provisions of the Companies Clauses Consolidation Act 1845, such of the shares of the capital of the Company as were paid up should be converted into capital stock of the Company, to be denominated Consolidated Stock.

1852.  
*Ex parte*  
 COPELAND.

The completion of the contract was from time to time postponed by continuation contracts, in consideration of sums of money by way of commission, called in the language of the Stock Exchange *contango*, which were paid to the broker for the privilege of extending the time limited by the original contract for payment.

On the 24th of *May* 1851, the shares were sold by the bankrupt at a loss of 20*l.* 10*s.*, including the amount paid for commission upon the continuations.

The petition for adjudication was filed on the 27th of *March* 1852.

Mr. *Russell* and Mr. *Martindale* for the Appellant.

What the Act contemplates is a single loss and not an aggregate of losses: this is shown by the word “contract” being in the singular number. Moreover, the commission paid upon the continuations cannot be taken as a part of the loss within the meaning of the Act. The commissioner omitted to advert to either of these considerations, for without the commission the aggregate loss was less than the 200*l.* The enactment is a penal one, and must be construed strictly. Another ground of objection is, that the time of entering into the contract upon which the loss arose, if it is to be considered as one contract, was not within the year next preceding the filing the petition for adjudication. Lastly,  
 the

1852.

*Ex parte*  
COPELAND.

the subject of the contract is not stock. It was merely a number of railway shares, and was so described in the bought and sold note. The shares were never actually converted into stock.

They cited *Hibblewhite v. M' Morine* (a).

Mr. Bacon and Mr. Selwyn for the assignees.

The whole transaction is in substance one. The loss upon it arose upon the ultimate resale, which was within the year next preceding the filing of the petition for adjudication. The commission was a material and substantial part of the loss, and was as speculative as the rest of the transaction. As to the shares not being stock, the only difference between the two is, that railway stock may be purchased to any amount, however small, but that only whole shares can be purchased. For the purposes of the Act the difference is immaterial. These shares had however been actually converted into stock, there being a resolution of the Company whereby shares, fully paid up (as these were), are declared to be so converted.

They cited *Ex parte Matheson* (b).

Mr. Martindale replied.

*The LORD JUSTICE LORD CRANWORTH.*

The first question is whether, assuming for the present that the contract complained of was for the purchase of stock within the Act, there has been a loss upon such purchase within the year of 200*l.* or upwards. There is no doubt that there has been such a loss of 202*l.* 10*s.* upon the transaction, if as part of the loss is to

(a) 6 *M. & W.* 200.

(b) 1 *De G. M. & G.* 448.

to be included the commission paid on the contract ; and we are clearly of opinion that the commission must be included as part of the necessary costs of accomplishing the contract, and as part of the loss. This, it is true, but slightly exceeds the amount fixed by the Act ; but if it does exceed that amount by the smallest fraction it is sufficient, not only to justify what the Commissioner has done, but to make it his positive duty so to deal with the case. Then the question is, whether the transaction amounts to a contract within the meaning of the statute ? One objection made by the Petitioner is, that this was not “ a ” contract, but that the loss was occasioned by a series of contracts. I think that there is nothing whatever in that objection, for I think that we must understand the word “ contract ” as including contracts even in the absence of the express enactment of the interpretation clause. It would be absurd to impute such carelessness to the legislature, as to leave the law open to be defeated by merely splitting the transaction, and putting it on two pieces of paper instead of one. Upon that, however, it is unnecessary to speculate, for by the interpretation clause of the Act it is provided that words in the singular number are to include the plural.

1852.

*Ex parte*  
COPELAND.

That being so, the next question is, whether this is Government or “ other stock ” within the meaning of the section ? It is perfectly clear that the subject-matter of the contract was stock and not shares, if there be a distinction. True it is, that it is described in the broker’s notes as “ shares upon which 100*l.* has been paid.” That, however, is capable of easy explanation. The beneficial interest in this Company, as in many others, while the affair is in progress, is in the form of shares on which calls are from time to time made, during so long as there is only part of the capital not paid up. When, however, the whole capital has been paid up, then it becomes

*The* LORD JUSTICE KNIGHT BRUCE.

1852.

*Ex parte*  
COPELAND.

Assuming that the merely legal question upon the construction of the 201st section ought to be decided in the bankrupt's favour, and not imputing to him unfairness, as that word is used and understood in private life, I still doubt very much—to say the least—whether the dealing and conduct of this gentleman have been of such a nature as to authorize the granting of his certificate. So much in passing. But I will take the question as it arises on the narrow and restricted view of the 201st section of the Act. As to that, if there is a distinction, a substantial distinction, for the present purpose between railway shares and railway stock, my opinion, upon the evidence before the Commissioner, with the additional explanation given to-day, is, that the property in question, on which a loss has taken place of more than 200*l.* within a year was railway “stock” as distinguished from railway “shares,” and was throughout intended and known by the bankrupt to be so.

But even if I were to assume that this point ought to be decided in the bankrupt's favour, still on the merely legal question, I am not satisfied that the bankrupt is free from the operation of the 201st section of the statute. The words of the section are “government and other stock ;” but the Act of Parliament is one which is in the like matter, and forms part of the same system with the Act of 5 *Geo.* II. c. 30, an Act which is now repealed. The language of the 12th section of that Act is, “or that within one year before he or she became bankrupt shall have lost the sum of 100*l.* by one or more contracts for the purchase, sale, refusal, or delivery of any stock of any Company or corporation whatsoever, or any parts or shares of any government or public funds or securities, where every such contract was not to be performed within the time of making such contract.”

Now,

1852.

*Ex parte* JOHN CHAMBERLAIN BARLOW AND  
FREDERICK WHITMORE.

Nov. 5.

In the Matter of JOHN SEPTIMUS MARYGOLD,  
a Bankrupt.

THIS was the appeal of the assignees of the above-named bankrupt from the refusal of Mr. Commissioner *Daniel* to make an order for the sale of certain goods, alleged to have been in the reputed ownership of the bankrupt at the time of his bankruptcy, but which were claimed by the Respondent, a mortgagee under a bill of sale.

On the 5th of *September* 1851 the petition for adjudication was presented to the Court of bankruptcy for the *Birmingham* district; and on the 6th of *September* the adjudication took place.

*Edward Lowe Cresswell*, the Respondent, entered upon the premises of the bankrupt, and took possession of his stock in trade, fixtures, and other goods under his bill of sale, which was dated in the month of *July* 1850.

The Appellants had brought an action of trover against the Respondent to recover the value of the goods.

Upon the trial of the action, Mr. Justice *Wightman* ruled, upon the authority of the case of *Heslop v. Ba-*

*ker*, the application. On his attending by counsel, and objecting to the order being made, the Commissioner refused the application, with costs. On appeal, held that the proper course of the assignees was to have appealed from the refusal to make the order on an *ex parte* application.

Before *The*  
LORDS JUSTICES.

After an action of trover had been brought by assignees to recover from a mortgagee goods alleged to be in the reputed ownership of the bankrupt, the assignees applied to the Commissioner for an order for a sale of the goods, as in *Ex parte Heslop*. The Commissioner declined to make the order on an *ex parte* application, and gave the assignees leave to serve the defendant in the action with notice of

bankrupt, the sale, alteration, and disposition, as owner, with the consent and permission of you the said *Edward Lowe Cresswell*. Dated this 11th day of *June* 1852."

1852.  
  
*Ex parte*  
 BARLOW.

The time appointed for hearing the motion was adjourned until the 6th of *July* 1852, when the hearing took place and the following order was made :

" Whereas an application hath this day been made to the Court for an order to sell and dispose of certain goods and chattels alleged to have been in the order and disposition of the bankrupt at the time of his bankruptcy, now upon hearing what was alleged by Mr. *Motteram* of counsel for the assignees, and by Mr. *Kettle* of counsel for *Edward Lowe Cresswell* by whom the said goods and chattels had been claimed, this Court doth hereby refuse the said application, with costs to be paid to the said *Edward Lowe Cresswell* out of the estate of the said bankrupt.

" *E. R. Daniell.*"

From this order the present petition was an appeal.

In opposition to the petition of appeal, the Respondent's solicitor deposed, that on the 6th of *July* 1852, he attended before the Commissioner, upon the motion being made for an order of sale, when the Respondent appeared and submitted to the jurisdiction of the Commissioner therein, and by his counsel fully stated and relied upon the facts, cases and decisions, and result of the action, and further insisted that the Plaintiffs were, by the verdict in the action, and the neglect to move the Court above in pursuance of leave granted as aforesaid, concluded, as to the whole of the stock in trade, and other effects, so possessed by the said *Edward Lowe Cresswell*, and were not entitled to the order prayed.

*The* LORD JUSTICE KNIGHT BRUCE.

1852.

*Ex parte*  
BARLOW.

There is some weight in the argument that if an order for sale be made, in the presence of the mortgagee, it will or may have the effect of prejudicing him in any proceedings which may take place at law. Is he willing to have the petition dismissed as against him without prejudice to any question? The order could then be made as upon an *ex parte* application.

Mr. *Petersdorff* submitted that if it were dismissed it ought to be so with costs.

Sir *W. P. Wood*, and Mr. *De Gex*.—As the Respondent went before the Commissioner, and prevented the order from being made, he ought to pay the costs thus occasioned. The Appellants did, in the first instance, apply to the Commissioner *ex parte* for an order, but the Commissioner declined to make it, and gave them leave to serve the Respondent. It was quite competent for the Respondent either not to have appeared, or to have appeared and to have objected to submit to the jurisdiction. In either case, the order could not have affected him. But having submitted to the jurisdiction, obtained an hearing and thus prevented the assignees from obtaining an order, to which they were entitled, he cannot, at all events, claim any costs which he has, through his own fault, incurred.

*The* LORD JUSTICE LORD CRANWORTH.

I think that the mortgagee ought not to have been served with notice of the intended application to the Commissioner. The proper course for the assignees to take was to appeal from the refusal of the Commissioner to make the order *ex parte*. I think that the Commissioner's order should be varied, by adding the words "without prejudice to any question," so that the refusal

O O O 2

of

1852.

*Ex parte*  
BARLOW.

of the order may not affect the assignees in any proceeding at law. But this is an addition which probably the Commissioner would have made if asked. The Respondent must have his costs of the appeal. We can then make an order for sale as upon an *ex parte* application; but the safer course will be to apply to the Commissioner *ex parte*, and he will no doubt make the order upon an intimation of the opinion of this Court. All question as to the jurisdiction of this Court to make an order, except upon appeal, will thus be avoided.

*The* LORD JUSTICE KNIGHT BRUCE concurred.

---

The following was the form of the order:—"This Court doth order that the order of Mr. Commissioner *Daniel*, made in this matter on the 6th day of *July* 1852, be varied by adding a declaration that such order is to be without prejudice to any question. And it is ordered that the said petition be, and the same is hereby, dismissed without prejudice to any question. And it is ordered that the said Petitioners do pay to the said Respondent his costs of and occasioned by this application. And it is hereby referred to *William Vizard*, Esq., an officer of this Court, to tax such costs between the parties. And the said Petitioners are to be at liberty to apply to this Court as to recouping themselves, in respect of such costs, out of the estate of the bankrupt."



1852.

July 7, 10.  
Nov. 10, 23.

*Ex parte* CHARLES TURNER and Others.

In the Matter of JOHN CROSTHWAITE, a  
Bankrupt.

THIS was an appeal on the part of the assignees, seeking to reduce the amount of a proof which the Commissioner had permitted to be made by the Respondent, *John Crosthwaite*, of *Thornthwaite*, under the following circumstances.

*Thomas Crosthwaite*, the uncle of the bankrupt, and of *John Crosthwaite*, of *Thornthwaite*, the Respondent, by his will, dated the 6th of *March* 1829, appointed his wife, together with *Thomas Raffles* and the bankrupt, his executors; and after giving some small legacies and directing payment of his debts, he gave to them all his estate, real and personal, upon trust for his wife for her life, and at her decease, subject to certain legacies, upon trust as to one moiety to pay over the rents and profits thereof to his sister-in-law *Betty Crosthwaite*, for her life, and after her decease upon trust to stand seised and possessed of the same moiety, to the use of his nephew

Before *The*  
LORDS JUSTICES.

One of the residuary legatees under a will was the surviving trustee of it. The other was subsequently appointed a new trustee under a power, the trust estate then consisting of 9000*l.* due from the continuing trustee, and of shares in a Company, valued at 6000*l.*, which were transferred into the names of the two.

After the death of certain *cestuis que trustent* who were entitled for life, and when the trust estate constituted a clear fund belonging in moieties to the two residuary legatees, subject only to the payment of legacies, which amounted to 4000*l.*, the continuing trustee became bankrupt, still owing the 9000*l.* to the trust estate. Held, that the new trustee was not entitled to prove for this amount, and retain the dividends till he should be paid his share in full, but could only prove to the extent of his beneficial interest immediately before the bankruptcy; and that, as the bankrupt could then have settled with him by paying 3500*l.*, that was the amount proveable.

When an order of reversal upon appeal rested in minutes, and the counsel for the Respondents stated that material considerations had not been brought before the Court, the Court acceded to a motion for rehearing, although twenty-one days had elapsed.

*Quære*, whether such rehearing was a matter of right.

1852.  
*Ex parte*  
TURNER.

the Respondent, his heirs, executors, and administrators; and as to the other moiety, upon trust to pay over the rents and profits to his brother and *Mary* his wife, and the survivor of them for their lives and the life of the survivor, and after the death of the survivor, then to stand seised and possessed thereof, in trust for their son the bankrupt, his heirs, executors, and administrators.

The testator died in the month of *January* 1832, and soon afterwards his will was duly proved by the widow and by *Thomas Raffles* and the bankrupt.

The widow died in *May* 1847, and in the following month of *November*, the Respondent was, pursuant to a power contained in the will, duly appointed a trustee in the place of *Thomas Raffles*. The deed under which he was so appointed, bore date the 17th day of *November* 1847, and it was therein recited that the testator's estate then consisted of ten shares in the stock of the *Carron* Company, and of the sum of 10,521*l.* 18*s.* 8*d.* cash in the hands of the bankrupt, and of *Thomas Raffles*. The whole of this sum in fact came to the hands of the bankrupt, no part of it having ever been received by the Respondent. Some of the legacies still remained unpaid; but it was assumed in the argument that the life interests in both moieties of the residue had expired, so that, subject to the payment of the unpaid legacies, the Respondent had become entitled to one moiety of the residue, and the bankrupt to the other moiety. The case was argued on the assumption that all the testator's debts had been long since paid.

The question, therefore, arose, to what amount the Respondent *John Crosthwaite*, of *Thorntwaite*, who was the only solvent trustee of the testator's property, ought

ought to be admitted to prove against the bankrupt's estate.

1852.

*Ex parte*  
TURNER,

The Commissioner admitted a proof to the amount of 9442*l.* 17*s.* 7*d.* The bankrupt admitted himself to be chargeable with sums amounting to 12,668*l.* 2*s.* 8*d.* come to his hands on account of the testator's estate, from which, however, he claimed to deduct 3225*l.* 5*s.* 1*d.* for payments properly made on account of the estate, leaving a balance of 9442*l.* 17*s.* 7*d.* still to be accounted for. Besides which, there were standing in the joint names of the bankrupt and of the Respondent, the ten shares in the *Carron* Company, estimated to be of the value of 6000*l.* So that the testator's estate consisted of the *Carron* shares, and of 9442*l.* 17*s.* 7*d.* due from the bankrupt, subject to the payment of the unpaid legacies, which amounted to about 4000*l.* and a small sum due for costs.

Mr. *Bacon* and Mr. *Selwyn*, in support of the appeal.

The trust estate being now a clear fund, the case is simply one of cross demands between the Respondent and the bankrupt. The Respondent is therefore entitled to one-half of the 9442*l.* 17*s.* 7*d.* due from the bankrupt, and the bankrupt is entitled to half of the produce of the *Carron* shares, after deducting the 4000*l.* due in respect of legacies, and the 56*l.* 4*s.* for costs. The deduction leaves nearly 1000*l.* due to the bankrupt on this account, and this must be set off against the 4500*l.* due from him to the Respondent. On no principle can the Respondent be allowed to prove for the bankrupt's share in the 9442*l.* 17*s.* 7*d.* as well as his own.

Mr. *Daniel* and Mr. *W. Morris*, for the Respondent.

The bankrupt's estate can be entitled to nothing until  
the

1852.  
 {  
*Ex parte*  
 TURNER.

the trust fund is replaced which has been lost through his default. The co-trustee is the proper person to prove for it. When the dividend has been received, that amount, with the produce of the *Carron* shares, will constitute, after payment of the legacies, the clear trust fund. Out of this the Respondent must be paid his share of the total clear residue, as it would have stood but for the bankrupt's default. If anything is left after deducting this amount, it will belong to the bankrupt's estate. The deficiency in the bankrupt's share will be that which he has himself already applied to his own use, no part of which can fairly be charged against the Respondent. Suppose the legacies had amounted to 6000*l.* instead of 4000*l.*, the bankrupt would have had his share in full, and if the Appellants are right, the Respondent would receive such dividend only, if any, on his, as would be payable from the bankrupt's estate.

[*The LORD JUSTICE LORD CRANWORTH.*—If before the bankruptcy the bankrupt had paid to the Respondent 3351*l.* 19*s.* 5½*d.* there would have been an end of all question between them. Can the proof be for any greater amount?]

They referred to *Morris v. Livie (a)*.

*Cur. adv. vult.*

July 10.

*The LORD JUSTICE LORD CRANWORTH* (after stating the case as above set out), said :

The testator's estate now consists of the *Carron* shares, and the 9442*l.* 17*s.* 7*d.* due from the bankrupt. Out of these funds the unsatisfied legacies must be provided for,

as

(a) 1 *Y. & C. C. C.* 380.

as must also a sum of 56*l.* 4*s.* said to be due for law expenses, assuming that sum to be really due. After satisfying these two claims, the bankrupt and *John Crosthwaite*, of *Thornthwaite*, will in fact be tenants in common of all which remains in equal moieties. *John Crosthwaite*, of *Thornthwaite*, will be entitled to retain whatever may remain of the *Carron* shares, after satisfying the legacies and law expenses, towards satisfying his share of the residue, and against that the bankrupt has a right to set off a sum equal to what shall be so retained, and this will go in reduction of the sum of 9442*l.* 17*s.* 7*d.* due from him. The balance, after making that deduction, is a sum to which he and *John Crosthwaite*, of *Thornthwaite*, are entitled in equal moieties, and therefore *John Crosthwaite*, of *Thornthwaite*, will be entitled to prove for one moiety of that sum for his own benefit. The result of this, according to the figures given to us, will be, that the proof stand for only 3351*l.* 19*s.* 5½*d.*, as contended for by Mr. *Bacon*, on behalf of the assignees.

1852.  
  
*Ex parte*  
 TURNER.

We arrive at this conclusion on the assumption that the sums with which the bankrupt is chargeable on account of his receipts are correctly stated as amounting to 12,668*l.* 2*s.* 8*d.*, and his payments to 3215*l.* 5*s.* 1*d.* Of course if this is disputed, *John Crosthwaite*, of *Thornthwaite*, is not bound by the bankrupt's admissions and statements as to his receipts and payments. But whatever may be their amount, the principle on which the proof must be made will be the same.

The proof to the extent of 9442*l.* 17*s.* 7*d.* was admitted, on the principle that proof might be made to the full extent of the assets for which the bankrupt, as executor and trustee, was accountable. This would have been quite right if the bankrupt had not himself been one of the parties interested in the balance due from him. But  
 being

volved in the bankruptcy. This arrangement, however, leaves the bankrupt still a debtor to the Respondent for part of his share of that portion of the estate, and the amount of the proof must, I think, be regulated accordingly.

1852.  
*Ex parte*  
**TURNER.**

Thus, according to my view, the Respondent will pay the whole of the unsatisfied legacies, and the outstanding demand for costs, debiting the bankrupt with half, which half, and as much as can be of the Respondent's moiety of the sum in the bankrupt's hands at the bankruptcy, must be paid by means of the bankrupt's half of the *Carron* property. The proof to be for the deficiency.

---

On this day

Nov. 10.

Mr. *Daniel* and Mr. *W. Morris* moved upon notice, that the above appeal might be reheard before their Lordships, and that the order made thereon might be varied. They stated that the order made on the appeal rested still in minutes, and that, since the hearing, material considerations had occurred to them, which had been either not at all or not sufficiently presented to the Court upon that occasion.

They cited *Ex parte Hinds (a)*.

Mr. *Bacon* and Mr. *Selwyn* opposed the application, and said that it was precluded by the 16th section of the Bankrupt Law Consolidation Act 1849, which provides that if no petition of appeal is entered within twenty-one days of the decision of the Vice-Chancellor (for whom now the Court of appeal was substituted), every such decision should be final.

*The*

(a) 3 *De G. & S.* 619.

*ly* (a), *Cole v. Muddle* (b), *Ex parte Turpin* (c), *Freeman v. Lomas* (d), *Ex parte Young* (e), *Ex parte Stephens* (f). They contended that the fact of the receipt of the 10,521*l.* 18*s.* 8*d.* by the bankrupt and *Thomas Raffles*, in the way in which it had been received by them, had been concealed from the Respondent, who was wholly ignorant of it, and that this amounted to a fraud upon the Respondent, and introduced an important element into the case, which had not been sufficiently brought before the Court upon the former hearing.

1852.  
  
*Ex parte*  
 TURNER.

Mr. *Bacon* and Mr. *Selwyn*, for the assignees, were not called upon by the Court.

*The LORD JUSTICE KNIGHT BRUCE.*

It is not my present impression, nor that of Lord *Cranworth*, that in the absence at least of actual misrepresentation, the ignorance of the Respondent upon the subject of the bankrupt's dealing with the trust-monies in his hands before the bankruptcy, is material. Supposing his ignorance to be material, it is not clear that he could be heard to say, after executing the deed, that he remained in ignorance as to what had become of the fund of which he had undertaken to be a trustee. Our present impression is, that the order already made is the correct order. If, however, either party should ask for an examination *vivá voce* of the bankrupt we will consider the application.

An application for a *vivá voce* examination was then made, but was not persisted in, and the motion to vary the order was refused with costs.

(a) 8 *Sim.* 180.

(b) 10 *Hare*, 186.

(c) *Mont.* 443.

(d) 9 *Hare*, 109.

(e) 2 *M. & A.* 228; and see

*Ex parte King*, *Ib.* 410.

(f) 11 *Ves.* 24.

*v. Goldring (a), Dickinson v. Shee (b), Glasscott v. Day (c), Alexander v. Brown (d), Harding v. Davis (e), Leatherdale v. Sweepstone (f), Kraus v. Arnold (g), Polglase v. Oliver (h), Finch v. Brook (i).*

1852.  
*Ex parte*  
**DANKS.**

*The* LORD JUSTICE KNIGHT BRUCE.

Mr. *Danks*, the Appellant, a timber merchant at *Great Bridge* in *Staffordshire*, had been after, or in and after the year 1849, employed by his near neighbour and familiar acquaintance of many years, Mr. *Farley* the Respondent, a publican and plumber and glazier, to do work and supply materials or goods for him. For this, Mr. *Danks* had sent in his bill, amounting to something between 96*l.* and 97*l.* Mr. *Farley* considered, or professed to consider, the bill too high, and disputed part of it, contending that the amount claimed should be reduced to the sum of 85*l.* 11*s.* 10*d.*; so, and upon no greater matter,—upon a matter that, if they had not good sense enough to settle it for themselves, some respectable neighbour would probably, upon application, have adjusted for them in an hour,—began (as I collect), the career of cost, and heat, and hatred, of reproach, scandal, and misery, in which they are now engaged, of which neither this day nor this year, nor perhaps another will, I fear, see the end, and which seems well to exemplify an old English saying, that the mother of mischief is no bigger than a midge's wing. Before *August* last, Mr. *Farley* professed to Mr. *Danks* to be, and perhaps

was

- |                                                  |                                                     |
|--------------------------------------------------|-----------------------------------------------------|
| (a) 2 <i>Mau. &amp; Sel.</i> 86.                 | (i) 1 <i>Bing. N. C.</i> 253. See                   |
| (b) 4 <i>Esp.</i> 67.                            | also <i>Jackson v. Jacob</i> , 3 <i>Bing.</i>       |
| (c) 5 <i>Esp.</i> 48.                            | <i>N. C.</i> 869; 5 <i>Scott</i> , 79; <i>Suck-</i> |
| (d) 1 <i>Car. &amp; P.</i> 288.                  | <i>ling v. Coney, Noy</i> , 74; <i>Black</i>        |
| (e) 2 <i>Car. &amp; P.</i> 77.                   | <i>v. Smith, Peake</i> , 88; <i>Lockyer</i>         |
| (f) 3 <i>Car. &amp; P.</i> 342.                  | <i>v. Jones, Peake</i> , 180, n.; <i>Cole</i>       |
| (g) 7 <i>Moore</i> , 59.                         | <i>v. Blake, Peake</i> , 179; <i>Bull v.</i>        |
| (h) 2 <i>Cr. &amp; Jer.</i> 15; 1 <i>Price</i> , | <i>Parker</i> , 2 <i>Dowl. N. S.</i> 345.           |
| 133; 2 <i>Tyr.</i> 89.                           |                                                     |



1852.  
 {  
*Ex parte*  
 DANKS.

was able and willing, to pay him the 85*l.* 11*s.* 10*d.*, if he would take that amount in full of his bill. This Mr. *Danks* refused to do, and high or abusive words passed between them, or at least from one to the other, after which Mr. *Danks*, without suing Mr. *Farley*, took the course of proceeding against him under the provisions of the Bankruptcy Act to which the 82nd section belongs, by what is, I believe, called in the modern dialect of bankruptcy a trader-debtor-summons. This was heard at *Birmingham* before Mr. Commissioner *Daniell* on *Saturday* the 14th of *August* last, when Mr. *Farley* signed an admission of the 85*l.* 11*s.* 10*d.* being due, disputed the residue of the demand, and made the usual deposition of his belief of having a good defence against it, but was not required to give a bond for that small amount.

Afterwards, in the course of the evening of the same day, that happened, of which the nature and particulars have been so much discussed, and, in some respects at least, so variously represented in this melancholy litigation. For avoiding bankruptcy, (which Mr. *Farley* seems to be, and all along to have been desirous to avoid,) it was under the statute necessary, or considered by all concerned as necessary, that, on or before the 23rd, perhaps on or before the 21st of that month, he should pay or tender to Mr. *Danks* the admitted 85*l.* 11*s.* 10*d.*; and there is, I think, no room for reasonable doubt, that on that same 14th of *August*, Mr. *Farley* had provided himself with the amount, namely 85*l.* 11*s.* 10*d.* in gold, silver, and copper money, and took from Mr. *Harris*, the clerk of Mr. *Reece*, the professional agent of Mr. *Farley* at *Birmingham*, in the Bankruptcy Court, his advice or instructions as to the manner of tendering it to Mr. *Danks*. A paper exists, on which were written, I am persuaded, on that occasion by Mr. *Harris*, the figures "85*l.* 11*s.* 10*d.*," and the words

words "tender and offer to pay," those being the expressions of the statute.

1852.  
*Ex parte*  
**DANKS.**

It was after this that Mr. *Farley*, on the same day, accompanied by his friend or acquaintance, Mr. *Hughes*, called on Mr. *Danks*, and saw him at his office at *Great Bridge*. It is stated by Mr. *Danks*, as well as by the other two, that they were that evening with him in his office there. And the whole of the present question between the litigants has been treated by them as turning on what took place in the office during that interview, which lasted, if more than two, but a very few minutes. Upon the hypothesis that Mr. *Farley* and Mr. *Hughes* speak the truth, Mr. *Farley* then paid to Mr. *Danks* the 85*l.* 11*s.* 10*d.*; so that, if not the whole of the debt, all of it except a sum not exceeding eleven or twelve pounds was then discharged; while, upon the hypothesis that Mr. *Danks* speaks the truth, nothing was paid to him, and *Farley* continued, and yet is, indebted to him, if not in the whole sum claimed, at least in 85*l.* 11*s.* 10*d.*, the admitted part of it. This particular question the Commissioner, I believe, by the order under appeal, decided or intended to decide in Mr. *Farley's* favour; and if it is incumbent on us in the performance of our duty to decide it either for or against him, we must not shrink from doing so.

There is, however, a possible view of the case which may exempt us from the obligation. Was the money, I mean of course the 85*l.* 11*s.* 10*d.*, tendered to Mr. *Danks* in his office on the evening of the 14th of *August* by Mr. *Farley*? If that really took place, then, whether Mr. *Danks* received or refused the money, there certainly was no act of bankruptcy, and the reversal of the adjudication must clearly stand; for my learned Brother and myself continue to dissent entirely from

1852.

*Ex parte*  
DANKS.

the argument, that upon the true construction of the statute Mr. *Farley* could not avoid an act of bankruptcy by paying or tendering the 85*l.* 11*s.* 10*d.* to Mr. *Danks* before the 15th of *August*. Now this point must be approached and considered, not only with great attention and caution, but without failing for a moment to recollect, first, that, while upon the disputed fact of payment (as to which either Mr. *Danks* is grossly perjured, or Mr. *Farley* and Mr. *Hughes* are so) the mind reserves itself or is uncertain, it must of course deem the question of the honesty or dishonesty of Mr. *Farley* and Mr. *Hughes* to be, in that respect at least, open; next, that where a litigant makes a deposition, statement, or representation bearing upon the matter in contest, it may be and frequently is reasonable, it may be and often is judicially right, to believe and act upon a part, while not believing and not acting upon another part, of the deposition, statement, or representation; further, that persons who have conducted themselves disgracefully, basely, and criminally are not necessarily unavailable witnesses, but are sometimes believed in support of a case which, without their testimony, would fail; and further, that when, of two men who, equally interested or equally disinterested, are also of equal capacity and equal powers of observation and memory, one asserts and the other denies a particular occurrence to have taken place in the presence of both, the probability or improbability of the occurrence, independently of the assertion and denial, is not to be disregarded.

After adverting to the evidence, his Lordship said:

I am convinced morally, and satisfied judicially, that the Respondent, when, in the evening of the 14th of *August*, he was with Mr. *Danks* in Mr. *Danks's* office, had brought thither, and had actually there in the room, 85*l.* 11*s.* 10*d.* in gold, silver, and copper money. Next, for  
what

what purpose had Mr. *Farley* brought the money thither? The same evidence and considerations which have convinced and satisfied me that he had the money with him there, convince and satisfy me also that he had brought it thither for the purpose of tendering it to Mr. *Danks*, and, if he would accept it, paying it to him in discharge of that portion of his demand which, at the Bankruptcy Court at *Birmingham*, in the early part of that day, had been admitted by Mr. *Farley* to be due to Mr. *Danks*.

1852.  
  
*Ex parte*  
*DANKS.*

Then comes the question, whether Mr. *Farley*, when in the office, either produced and showed the money to Mr. *Danks*, or, after addressing him on the subject, shook the money or part of it in a bag or pocket, so that Mr. *Danks* heard money (to use a phrase used in the evidence) “jingle.” That, if both these things were not, one or the other of them was done, is, to my mind, perfectly clear. This last question may or may not be essential or material; but that to which I now come seems certainly so,—the question, namely, whether Mr. *Farley* did in the office state to Mr. *Danks*, distinctly and so as to be heard and understood by him, thus, in effect and substance :—That Mr. *Farley* had brought with him, and then had there, 85*l.* 11*s.* 10*d.* for the purpose of paying to Mr. *Danks*, and offered then and there to pay him that sum, being the amount admitted to be due to him from Mr. *Farley*. The question is not, I say, whether these very words were used, but whether Mr. *Farley* expressed himself in that sense, and so as to be understood in that sense by Mr. *Danks*; and it is my opinion morally, as well as my conclusion judicially, upon all the materials before the Court, that this question ought to be answered in the affirmative.

[His Lordship then adverted to the portions of the evidence bearing upon this point.]

P P P 2

Assuming

1852.

*Ex parte*  
DANKS.

Assuming my views, so far as I have stated them, to be correct, I come next to the question, whether what I have represented myself as considering to have taken place in the office on the 14th of *August* amounted to a legal and sufficient tender of the 85*l.* 11*s.* 10*d.* by Mr. *Farley* to Mr. *Danks*; and I am of opinion that it did, which I say without declaring or intimating an opinion whether the money was in fact produced so as to be actually seen by him; for, if he did not see it, but desired to see it,—if he knew not, but doubted whether his debtor had the money ready then and there, Mr. *Danks* might have asked to see it, might have so expressed himself or acted as to render the actual exhibition of the naked money incumbent on Mr. *Farley*. But from the evidence it is, I think, clearly to be inferred that if it was not exhibited in an uncovered state, Mr. *Danks* so expressed himself and so acted as to render that unnecessary and to dispense with it.

He does not appear to have taken any objection to the invisibility of the money, if it was invisible. He says in effect that he told Mr. *Farley* that he would not receive it, for that is the substance of what Mr. *Danks* has stated to the Court. Whether he did or did not refer Mr. *Farley* to his attorney is, I conceive, upon this point of tender, not at all material.

To this conclusion, namely, that there was a legal and sufficient tender of the 85*l.* 11*s.* 10*d.* so as to support even a plea of tender, I have come, after an examination before and upon *Saturday* last, of all the authorities mentioned during the argument on that day as well as some others. But I wish to add, that I am not quite satisfied that, according to the true meaning of the Bankrupt Law Consolidation Act the same formality and strictness are necessary to avoid committing an act  
of

of bankruptcy under the 82nd section, as are necessary to support a plea of tender. I can conceive the possibility, nay likelihood, of oppression and injustice arising from so holding, which I say, not certainly the less though not the more readily, from what Lord *Tenterden*, in one of the cases cited, appears to have said, as to the difficulty of supporting a plea of tender.

1852.  
*Ex parte*  
*DANKS.*

Nor is it clear to me that it would be the duty of this jurisdiction to allow a man to be declared a bankrupt under the 82nd section, in circumstances such as those which I believe to exist here, even if rigorously in point of strict law there was an act of bankruptcy committed, which, as I have said, I do not think.

These views of the case, or of a portion of the case, render it allowable for me to abstain, as I do, from expressing or intimating an opinion whether Mr. *Danks* received or did not receive the money alleged to have been paid to him.

I need scarcely add, that in all that I have been saying I have assumed, in the Appellant's favour, that there must have been, under the 82nd section of the Bankruptcy Act, an act of bankruptcy committed by Mr. *Farley*, if he neither paid nor in any sense tendered or offered to pay the 85*l.* 11*s.* 10*d.* to Mr. *Danks*.

That, however, I wish to be understood as having assumed merely for the purpose of the argument. I am not at present satisfied that, on the hypothesis of fact just supposed, there was, upon the true construction of the statute, an act of bankruptcy, seeing what had taken place at the Bankruptcy Court of *Birmingham* on the 14th of *August* (a). As to this, however, I give no opinion,

(a) It has now been decided in the Court of Exchequer Chamber that there would not have been an act of bankruptcy. See *Oldfield v. Dodd*, 8 *Exch.* 578.

1852.

*Ex parte*  
DANKS.

nion, continuing to think, that, had it been necessary to decide the point, it would have been right to endeavour to have it argued and decided in the presence of the Lord Chancellor.

However the law in that particular respect may be, I am of opinion that the Commissioner's reversal of the adjudication of bankruptcy in this case ought not to be disturbed, and that the petition of appeal must consequently be dismissed; but that the Respondent's costs should be reserved until after judgment, whether by discontinuance, or of nonsuit, or otherwise for or against him in the pending action, or further order, with liberty to apply.

*The* LORD JUSTICE LORD CRANWORTH.

I entirely concur in what my learned Brother has said, except (he will allow me to say) that I doubt whether the tender, in order to prevent an act of bankruptcy, must not be a strict legal tender. I do not think that question arises, but I wish to guard myself against assenting to that proposition. And I understand that my learned Brother merely doubts. As at present advised, I think there must be either actual payment or actual tender, so that if an action were brought, there might be pleaded either tender or payment, just in the same way as if there had been no proceeding in bankruptcy.

But I am of opinion that in order to make out an act of bankruptcy, the *onus* is on Mr. *Danks* to prove that there was no tender and no payment. There is no act of bankruptcy arising from the admission of the debt, if the debtor afterwards pays it, but if he does not afterwards pay or tender it, the admission constitutes an act of bankruptcy. In order to prove that an act of bankruptcy has been committed, the person who is to establish this must prove positively that the debtor signed the admission.

sion, and negatively that he did not pay, and did not tender. The question, therefore, before us is, has Mr. *Danks* satisfied us that Mr. *Farley* did not tender or did not pay this debt? Now, I feel a relief, like my learned Brother, in not finding it our duty to decide who is the criminal in this case. Putting the matter in the most favourable view for Mr. *Danks*, not only do I think that he has not proved that there was no tender, but I think upon no possible supposition can we come to the conclusion otherwise than there was a tender.

1852.  
  
*Ex parte*  
 DANKS.

Now, in order to make a tender, I assume that the person pleading the tender must either have actually produced the money, or have been ready and able to produce it, and only be prevented from producing it by the other party dispensing with his so doing. And in my opinion, for the reasons which have been very fully pointed out by my learned Brother, it is clear to demonstration that Mr. *Farley* had the money, the exact sum; that he had it there for the purpose of tendering it; that he came instructed by his solicitor as to the mode in which he was to make that tender, and that he did make that tender; make the offer to produce it, even supposing the money was never out of his pocket.

It appears to me conclusively established, that Mr. *Farley*, coming with the money in his pocket for the purpose of tendering it, did say, in effect, to Mr. *Danks*, "I have the money here, 85*l.* 11*s.* 10*d.*; here it is. I tender and offer to pay you." Mr. *Farley*, as we know, says not only that he did that, but that he produced it, and goes on to say that it was accepted and taken. Suppose he did not produce it, I think Mr. *Danks's* evidence amounts to a clear dispensation with the production, because what he says is this, "You are wasting your time, Sir. I will have nothing to do with it; you have come too

too



1852.

*Ex parte*  
DANKS.

too late ; you must go to Mr. *Motteram*." It appears to me that that is, on all the authorities, both in point of precedent and in point of good sense, a dispensation with any further proceedings towards a tender. Mr. *Farley* had the money, offered to pay it, was ready to produce it, and, according to his own statement, did produce it; and, according to the statement of the creditor, did not produce it only because his creditor told him, "It is of no use ; you are wasting your time ; go away ; I will not receive it ; go to my solicitor." Therefore, it appears to me that Mr. *Danks* not only has not proved an admission, and that there was no tender, but it is distinct upon the evidence that though there was an admission, there was a subsequent tender.

Nov. 23.

*Ex parte* THOMAS EYRE AND CHARLES  
HIGGINS.

In the Matter of CHARLES BELTON.

Before *The*  
LORDS JUSTICES.

A petition appealing from the allowance of a bankrupt's certificate was served at the last known place of abode in the country of the bankrupt, who had gone out of the jurisdiction, but no order had been obtained for such service. Held, that the petition must be dismissed, and could not be ordered to stand over for leave to be obtained, notwithstanding the bankrupt appeared by counsel to take the objection.

THIS was the petition of the petitioning creditors appealing from the decision of the Commissioner, whereby the bankrupt's certificate was allowed as of the second class, with a suspension of three months, and praying for its total refusal. The affidavit of service of the petition on the bankrupt only proved service at his last known place of abode in *England* ; but affidavits were read, stating that the bankrupt had gone to reside at *Boulogne*, and that although the utmost diligence had been used to serve the petition on him there, all attempts

the jurisdiction, but no order had been obtained for such service. Held, that the petition must be dismissed, and could not be ordered to stand over for leave to be obtained, notwithstanding the bankrupt appeared by counsel to take the objection.

attempts for that purpose had been unsuccessful. No order had been obtained for service at the bankrupt's last known place of abode.

1852.  
*Ex parte*  
EYRE.

Mr. *Renshaw* appeared in support of the petition.

*The* LORD JUSTICE KNIGHT BRUCE said, that, without an order, the service on the bankrupt was not sufficient.

Mr. *Renshaw* asked that the petition might be allowed to stand over for an order to be obtained for substituted service.

*The* LORD JUSTICE KNIGHT BRUCE.

According to the old practice, petitions to stay certificates never used under such circumstances to be ordered to stand over. If not properly served, they were always dismissed.

Mr. *Renshaw*.—But the bankrupt appears by counsel.

*The* LORD JUSTICE KNIGHT BRUCE.

The practice used to be that he might appear and object to the want of service. Has that practice been altered? My impression is, that unless the practice has been changed the petition must be dismissed.

*The* LORD JUSTICE LORD CRANWORTH.

There seems an anomaly in the bankrupt appearing and yet objecting to want of service; but if the practice is settled, we should not alter it on this application.

Mr. *Glasse*, for the bankrupt, referred to *Ex parte Hopley* (a), *Ex parte Groome* (b), *Ex parte Hetherington* (c), and the cases there cited.

*The*

(a) 2 J. & W. 220.

(b) *Buck*. 39.

(c) 1 *Mont. & A.* 607.

1852.

*Ex parte*  
EYRE.*The* LORD JUSTICE KNIGHT BRUCE.

I am afraid that the practice is settled. Would the Petitioners prefer to have their petition dismissed without costs as against the bankrupt, undertaking not to file another, or to have it simply dismissed with costs?

The Petitioners electing the former alternative, the petition was dismissed with costs as against the assignees, and without costs as against the bankrupt, the Petitioners undertaking not to file another petition for the same purpose.

---

*Dec. 7.* *Ex parte* FREDERICK HODGSON EVANS AND  
EMILY AGNES WASS.

In the Matter of CHARLES WENTWORTH WASS.

Before *The*  
LORDS JUSTICES.

By an antenuptial settlement, a trader covenanted with the trustees of it to pay them 3000*l.* out of the first capital monies, or real or capital personal estate, or capitalized

income, of or to which he should be or become possessed or in anywise entitled after the solemnization of the marriage within six months after he should "have become" so possessed or entitled. The trader was at the time possessed of stock in trade and effects exceeding in value 3000*l.*, and so continued for more than six months after the date of the settlement, but did not after the marriage acquire additional property to that amount. He became bankrupt after the expiration of the six months. Held, that the event contemplated by the covenant had happened before the bankruptcy, and that there was a breach of the covenant entitling the trustees to prove.

THIS was a petition by way of appeal from the decision of Mr. Commissioner *Evans*, rejecting a proof. By the settlement made previously to the marriage of the bankrupt, *C. W. Wass*, dated the 27th *May* 1851, the bankrupt, amongst other things, for himself, his heirs, executors, and administrators, covenanted with the Appellants, their executors, administrators, and assigns, in the following words: "In case the said intended marriage shall take effect, the said *C. W. Wass* and his heirs, executors, or administrators, shall and will

will out of the first capital money, or real or capital personal estate or capitalized income, of or to which he shall be or become possessed or in anywise entitled after the solemnization of the said intended marriage, pay or cause to be paid, within six calendar months after he shall have become so possessed or entitled as aforesaid, unto the said *F. H. Evans* and *C. Hawker*, their executors, administrators, or assigns, the sum of 3000*l.* sterling; nevertheless, upon the trusts and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed and declared of and concerning the same; that is to say, upon trust that they, the said *F. H. Evans* and *C. Hawker*, and the survivor of them, and the executors or administrators of such survivor, and their or his assigns (hereinafter called the said trustees or trustee), do and shall during the life of the said *C. W. Wass* permit the said sum of 3000*l.* to remain upon the security of his said covenant, until the said trustees or trustee shall be required to call in the same by his said intended wife, such request to be signified by writing under her hand, or in case of and after her death in the lifetime of the said *C. W. Wass*, for and during such time as the said trustees or trustee, in their or his uncontrolled and absolute discretion, and without being accountable for the exercise of such discretion, or being considered guilty of a breach of trust for such permission, or for omitting to call in and require payment of the same sum of 3000*l.* or any part thereof, shall think proper. But in case the said *C. W. Wass* shall die whilst the said sum of 3000*l.* or any part thereof shall remain unpaid, or in case of such request in writing as aforesaid being made to the said trustees or trustee by the said intended wife, or in case in the event of and after her death in the lifetime of the said *C. W. Wass*, the said trustees, if more than one, shall unanimously, or the only trustee for the time being shall in his absolute

1852.

*Ex parte*  
EVANS.

1852.

*Ex parte*  
EVANS.

lute discretion, think fit, then and in any of the said cases, upon trust that they the said trustees or trustee shall, as soon as conveniently might be after the decease of the said *C. W. Wass*, or after such request in writing as aforesaid shall be made to the said trustees or trustee by the said intended wife, or they or he shall after her death in the lifetime of the said *C. W. Wass* think fit in manner aforesaid so to do (as the case may be), call in and receive, and if necessary or expedient take and use such compulsory ways or means at law or in equity as they or he shall consider proper for the purpose of enforcing or compelling payment of the said sum of 3000*l.* or any part thereof which shall remain unpaid by the said *C. W. Wass*, and shall stand possessed of the same sum and every part thereof, as and when the same shall be received, upon the trusts hereinafter declared concerning the same." The trusts of the money were for investment and payment of the dividends to the wife for life for her separate use, without power of anticipation; and as to the capital, for the issue of the marriage, with an ultimate trust for the bankrupt after the death of his wife, in the event of there being no child of the marriage becoming entitled under the preceding trusts.

The marriage took place in *May* 1851, and the bankrupt was then, and down to the time of the bankruptcy, continued possessed of stock in trade, consisting of pictures, bronzes, and other works of art, goods, and monies used in his trade of a picture-dealer, far exceeding the 3000*l.*

The adjudication took place on the 13th of *May* 1852, and the 3000*l.* not having been paid to the trustees, they tendered the proof in question for that amount. The Commissioner, however, held that the words of the covenant pointed to some future savings or acquisitions  
of

of property, and that as there was no proof of property to the amount of 3000*l.* having been acquired after the marriage, no breach of covenant had taken place.

1852.  
*Ex parte*  
EVANS.

Mr. *Follett* and Mr. *Caillard*, in support of the appeal, cited from *McCulloch's* "Commercial Dictionary" (*a*), the following explanation of the word "capital:" "but in commerce, and as applied to individuals, it is understood to mean the sum of money which a merchant, banker, or trader adventures in any undertaking."

Mr. *Lee*, for the assignees.

The bankrupt never had capital or capitalized income. *Adam Smith*, in Chapter I. of "Wealth of Nations," Book II., thus explains capital: "His whole stock, therefore, is distinguished into two parts. That part which he expects is to afford him his revenue is called his capital. The other is that which supplies his immediate consumption, and which consists either first, in that portion of his whole stock which was originally reserved for this purpose; or secondly, in his revenue, from whatever source derived, as it gradually comes in; or thirdly, in such things as had been purchased by either of these in former years, and which are not yet entirely consumed; such as a stock of clothes, household furniture, and the like. In one or other, or all of these three articles, consists the stock which men commonly reserve for their own immediate consumption." At all events, the bankrupt did not become possessed of it after the date of the settlement. The words "shall be or become" cannot apply to property which he had at the time. If this had been intended to be comprised in the covenant, the words would have been "if the said *C. W. Wass* is now or shall become." The stipulation as to the time of payment, which is to be within six months after he shall have

(*a*) Page 250, 2nd edit.

1852.

*Ex parte*  
EVANS.

have become so possessed or entitled, removes any doubt, if there could be any, as to this. A mere contingent liability which had not become a debt at the time of the bankruptcy, cannot be the subject of proof: *Ex parte Davies* (a).

*The LORD JUSTICE KNIGHT BRUCE.*

Considering the very strange language of this instrument, unlike any which I have ever met with, I cannot feel surprise that different minds should take different views of the interpretation of it. My impression however is, that no portion of the words "be or become entitled" ought to be rejected; nor do I think that in such a case the force properly belonging to these words ought to be diminished by reason of the circumstance that when the expression "become" is used afterwards, it is not accompanied by the word "be." Bearing in mind that expression, and also bearing in mind the extensive range of the terms "capital money, or real or capital personal estate, or capitalized income," I am of opinion that there was a breach of the covenant contained in this settlement: for the marriage took place more than six calendar months before the bankruptcy, and I think it satisfactorily proved that at the time of his marriage Mr. *Wass* was worth 3000*l.* and upwards, beyond all debts. On the best construction that I can put upon these unaccountable words, it appears to me that at the end of six calendar months there was a breach of the covenant, entitling the trustees to recover the 3000*l.* With great deference, therefore, to the opinion entertained by the learned Commissioner, I think the proof of the trustees ought to be admitted.

*The LORD JUSTICE LORD CRANWORTH.*

I am of the same opinion. The question is, whether  
the

(a) *Mont.* 121—297.

the trustees could have maintained an action for this sum of 3000*l.* at the end of six calendar months after the marriage. For this purpose, it would in my opinion have been sufficient for them to have alleged that at a period within six calendar months from the time of the marriage Mr. *Wass* was possessed or entitled to capital, money, or real or capital personal estate, or capitalized income, to the extent of 3000*l.*, or that he had become so entitled within that time. The way in which I read these words is this, "shall be paid out of the first capital monies to which he should be or become possessed or entitled." Now I think, that as he was so entitled at the time of the marriage, he was entitled within that period, and that that averment would have been made out, and that the trustees have therefore a right now to prove.

1852.  
*Ex parte*  
EVANS.

The costs of all parties were ordered to be paid out of the estate.

---

*Ex parte* JOB BROADHURST.

Dec. 7, 17.

In the Matter of JOB BROADHURST,  
against whom, &c.

**T**HIS was an appeal from the decision of the Commissioner, refusing to annul an adjudication. The ground on which the validity of the adjudication was disputed was, that there was no sufficient petitioning creditor's debt.

Before *The*  
LORDS JUSTICES and  
MR. JUSTICE  
MAULE.

The father of  
a continuing  
partner cove-  
nanted with

In an incoming partner that the debts of the old firm did not exceed a certain sum, and that if they did, he would on demand pay the new firm or the creditors of the old firm the amount of the excess. The debts exceeded the stipulated amount. Held, that the excess did not constitute a good petitioning creditor's debt against the father, or more than a claim for unliquidated damages.



1852.

*Ex parte*  
BROAD-  
HURST.

In *March* 1852, *Josiah Perry & William Knight Broadhurst* (the son of the Appellant), carried on business in partnership, as earthenware manufacturers at *Fenton* in *Staffordshire*. In that month the Respondent *Edward Walker* agreed to join the partnership, and with a view to this arrangement, an account was taken and a valuation made of the stock in trade, utensils, and partnership effects, and of their debts and credits. The debts due to the firm were valued at 99*l.* 16*s.* 3½*d.*

Partnership articles were then executed. They were dated the 6th *March* 1852, and were made between *Josiah Perry* of the first part, *William Knight Broadhurst* of the second part, the Respondent of the third part, and the Appellant of the fourth part. They contained a recital that it was part of the terms of the agreement upon which the Respondent agreed to become a partner with *Josiah Perry* and *William Knight Broadhurst*, that the Appellant should covenant with the Respondent that the debts owing to the late firm of *Perry & Broadhurst*, included in the valuation, and accounted at their full value, would realize so much money to the said *Josiah Perry, William Knight Broadhurst*, and the Respondent, and that the debts owing by the said firm of *Perry & Broadhurst* would not exceed the amount charged to the account thereof in the valuation, and that he would pay the deficiency in the former case, and the excess in the latter. By the witnessing part of the deed, the Appellant covenanted with the Respondent, his executors and administrators, that the debts then owing to the said *Josiah Perry & William Knight Broadhurst* would realize to the said *Josiah Perry, William Knight Broadhurst*, and *Edward Walker*, in the whole, the sum of 99*l.* 16*s.* 3½*d.*, being the amount at which the same had been valued, and that if the same did not realize the said sum, the Appellant and his heirs, executors, and administrators

administrators should and would on the demand of the said *E. Walker*, his executors and administrators, pay the deficiency unto the said *Josiah Perry*, *William Knight Broadhurst*, and *Edward Walker*, and also that the debts owing by the said *Josiah Perry & Edward Knight Broadhurst* did not exceed 1199*l.* 12*s.* 2½*d.*, at which sum they had been taken in the account, and that if they should exceed that sum, the Appellant, his heirs, executors, and administrators should and would, on the demand of the Respondent, his executors or administrators, out of his or their own private funds pay to the said *Josiah Perry*, *William Knight Broadhurst*, and *Edward Perry*, or to the persons to whom the same might be due, the sum by which the debts last aforesaid might exceed the sum last aforesaid.

1852.

*Ex parte*  
BROAD-  
HURST.

After giving several previous notices, the Respondent, on the 26th of *June* 1852, caused to be served upon the Appellant a notice requiring payment to be made to him at the works on the 28th of *June*, of the sum of 1062*l.* 16*s.* 11*d.*, in respect of the following particulars:—The sum of 36*l.* 5*s.* 8½*d.* as being the amount of debts and monies comprised in and forming part of the sum of 99*l.* 16*s.* 3½*d.* mentioned in the covenant, and which said sum of 36*l.* 5*s.* 8½*d.* was in the demand stated not to have been as to part thereof realized, and the further sum of 1026*l.* 11*s.* 2½*d.*, therein stated to be the excess of debts then ascertained to have been due and owing from and by *Josiah Perry & William Knight Broadhurst*, over and above the sum of 1195*l.* 12*s.* 3½*d.*, mentioned in the articles.

Payment not having been made of any part of the sums thus demanded, the Respondent petitioned for adjudication in bankruptcy against the Appellant, and in his affidavit of debt deposed that the Appellant was

1852.

*Ex parte*  
BROAD-  
HURST.

justly and truly indebted to him in the sum of 441*l.* 7*s.* 10*d.*, under the indenture of the 6th *March* 1852, inasmuch as the debts due and owing by the said *Josiah Perry & William Knight Broadhurst*, at the time of the execution of the indenture, amounted to 1637*l.*, being more than the sum of 1195*l.* 12*s.* 2½*d.* by the said sum of 441*l.* 7*s.* 10*d.*, and that the Appellant did not pay the same or any part thereof to the said *Josiah Perry, William Knight Broadhurst, & Edward Walker*, although the same was demanded of him by the said *Edward Walker*; and that he had received no security or satisfaction whatsoever for the said sum of 441*l.* 7*s.* 10*d.* or any part thereof except the said indenture.

Upon this deposition and upon depositions as to the other requisites, the Commissioner, on the 16th of *October* 1852, adjudicated the Appellant a bankrupt, and on his showing cause against the adjudication it was confirmed.

Against this decision the Appellant now appealed.

When the appeal had been argued, their Lordships offered the Appellant's counsel their choice between having the appeal re-argued before their Lordships, with the assistance of a common-law judge, or to have the appeal stand over with leave to bring an action. They preferred the former alternative, and the case was re-argued before their Lordships and Mr. Justice *Maule*, by one counsel on each side. The arguments were substantially the same on both occasions.

Mr. *Rolt* and Mr. *Roxburgh*, in support of the appeal.

This is the case of a mere contract for indemnity, where no loss is proved to have been sustained. The Respondent did not, on becoming a partner in the firm, become liable to the antecedent debts. The only interest which he had in their payment was that which he had in the

the credit and solvency of his partners remaining unimpaired. It is not shown, nor is it the fact, that he has suffered any loss or prejudice by the difference between the estimated and actual amount of the debts of the old firm. If he had suffered any prejudice, it would not be measured by that difference. Nor is that difference agreed to be paid as liquidated damages. Indeed, from the nature of the case, the amount could not be ascertained without the intervention of a jury. Moreover, no proper demand has been made, that served upon the Appellant requiring payment to be made to the Respondent, to whom the Appellant had never covenanted to pay anything.

1852.  
  
*Ex parte*  
 BROAD-  
 HURST.

They referred to *Utterson v. Vernon* (a), *Green v. Bicknell* (b), *Taylor v. Young* (c), *Loosemore v. Radford* (d), *Re Willis* (e).

Mr. *Daniel* and Mr. *Quain*, for the Respondent.

There is nothing unliquidated or unascertained in the demand arising under this contract. It is an express covenant to pay to the Respondent the difference, if any, between the estimated and actual amount of the debts due from the original firm at a definite period of time. As soon, therefore, as it is ascertained (as it now is) what that difference was at the time of the contract, the contract becomes perfectly definite, and the sum agreed to be paid certain. There is no question for a jury; it would not even go to the Master. The averment would be that the actual debt exceeded the scheduled debts by 44*l.* 7*s.* 10*d.*, and the judgment would be final. There was sufficient consideration for the contract, namely, the interest

(a) 3 *T. R.* 539.

(b) 8 *A. & E.* 701.

(c) 3 *B. & A.* 521.

(d) 9 *M. & W.* 657.

(e) 4 *Exch.* 530.

1852.  
 {  
*Ex parte*  
 BROAD-  
 HURST.

interest which an incoming partner has in the credit of the others. It being therefore a positive engagement to pay a certain sum, founded on a sufficient consideration, and not contrary to any rule of law or policy, what is there to prevent effect being given to it? The Statute of Limitations would run from the time of the demand made. Every debt is in some respects uncertain, and might be reduced by a jury. For example, a debt for goods sold and delivered, or on a solicitor's bill, might be reduced. But these are nevertheless good petitioning creditors' debts. To say that this is a contract of indemnity is a mere gratuitous and unfounded assumption. It would be to introduce into a written agreement a new term upon mere speculation; for nothing about indemnity is mentioned in the instrument.

They referred to *Ingledew v. Cripps* (a), *Ex parte Moffatt* (b), *Ex parte Tindal* (c), *Young v. Taylor* (d), *Barber v. Butcher* (e), *Lethbridge v. Mytton* (f), *Ex parte Southall* (g).

MR. JUSTICE MAULE.

I think that this is not a demand which will sustain an adjudication. [After stating the circumstances of the case, his Lordship said:] It is clear, from the recitals of the deed, that this covenant was entered into solely for the benefit of Mr. *Walker*. It is not the case of a covenant with *Walker* on behalf of *Walker, Perry, & Broadhurst*. *Perry & Broadhurst* have no interest in it. *Walker* is alone interested. That being the state of things, it seems to me impossible to turn this covenant

(a) 2 *Ld. Raym.* 814.

(b) 2 *M. D. & D.* 170.

(c) *Mont.* 375.

(d) 8 *Taunt.* 315.

(e) 8 *Q. B.* 863.

(f) 2 *B. & Ad.* 772.

(g) *Mont. & Ch.* 346, 656.

nant into a contract to pay a liquidated sum to *Walker*. The covenant would not be performed by doing that. It would be performed by putting Messrs. *Perry, Broadhurst, & Walker* in the same position in which they would be as if the debts due from and to the firm of *Perry & Broadhurst* had not been greater or less than the stipulated amounts respectively. That was alone the object of the covenant; and as there is no covenant to pay any sum to *Walker*, but only a covenant for something out of which *Walker* would derive a certain benefit, it could not, in an action upon the covenant, be considered that there was any specific sum to be recovered. The right to recover in such an action would be co-extensive with the amount of damage which *Walker* had sustained by the debts being of a different amount, and it would be impossible to make it the subject of computation, so that it could constitute a good petitioning creditor's debt.

1852.

*Ex parte*  
BROAD-  
HURST.

I do not say that if there is a covenant with *A.* to pay a sum for the use of *A., B., and C.,* or in trust for them, that such a covenant may not constitute a good petitioning creditor's debt in *A.* against the covenantor. but here there does not appear to be a state of things like that. It may be that no damage has been sustained of sufficient amount to constitute a good petitioning creditor's debt. There is nothing to show that the damage is of the amount stated. But, whether the amount of damages is greater or less, it is not a demand of that character which will constitute a good petitioning creditor's debt. I think the question before the Court must be answered in the negative.

*The* LORD JUSTICE KNIGHT BRUCE.

We are much indebted to the learned Judge for his valuable assistance. With respect to the views taken by

1852.

*Ex parte*  
BROAD-  
HURST.

my learned Brother and myself, one of us, at the conclusion of the first argument, entertained the view which has now been expressed. The other of us has entertained doubt, and his mind is not now free from doubt. But, considering the nature of the question, and the weight of the two opinions that have been formed upon it here, he considers it his judicial duty to withdraw the doubt which did not amount to dissent. The bankruptcy will therefore be annulled, the bankrupt undertaking to bring no action.

Dec. 10.

*Ex parte* CHARLES PEMBERTON.

In the Matter of WILLIAM TYTHER, a Bankrupt.

Before *The*  
LORDS JUSTICES.

The solicitor to the fiat having delivered his bill of costs, and retained the amount of it before the end of 1850, was discharged in *July* 1851. No application for taxation was made before *October* 1852.

*Held*, that it was not consistent with

safety or propriety to direct taxation in a summary way, even if the Court had jurisdiction to do so. But *semble per* Lord Cranworth, that the Court had no such jurisdiction.

THIS was an appeal from the decision of the Commissioner directing taxation of the Appellant's bill of costs. The Appellant had been solicitor to the fiat up to the month of *July* 1851, when he was discharged, and another solicitor was appointed. He had before the end of 1850 delivered his bill of costs, which was with the proceedings, and had retained the amount out of the monies received by him on account of the estate, but the bill had never been taxed. The new solicitor became on his appointment acquainted with these facts, but did not intimate any intention to tax the bill till *October* 1852.

Sir *W. P. Wood* and Mr. *Tripp*, in support of the appeal.

The

The payment of these bills, and the length of time since elapsed, excluded any jurisdiction on the part of the Commissioner to tax them, and even if he had jurisdiction, still a case where there has been so much laches is not a fit one for its exercise.

1852.  
*Ex parte*  
 PEMBERTON.

Mr. *Swanston* for the Respondents.

Under the Bankrupt Law Consolidation Act, 1849, the Commissioner has the same jurisdiction as was previously exercised by the Vice-Chancellor. Now there is no doubt that the Vice-Chancellor might have at any time reviewed an allowance of costs and directed them to be taxed.

Sir *W. P. Wood*, in reply, was stopped by the Court.

*The LORD JUSTICE KNIGHT BRUCE.*

I will assume that the question of jurisdiction ought to be decided as Mr. *Swanston* contends. I will assume that there was no regular taxation. The case then will stand thus. The amount of the bills of costs was either paid to the solicitor or retained by him out of the estate, before the end of 1850. In the month of *July* 1851, the solicitor was discharged. In that month the attention of his successor, (an experienced solicitor practising in *London*,) was drawn to the bills then remaining with the proceedings which are at *Birmingham*. The new solicitor asked for office copies of them. I will assume that this demand ought to have been complied with. But he knew where they were, and it does not appear that from that time till the month of *October* 1852, any information was communicated to the Appellant, that any objection was made to his bills, or that there was any intention to tax them: a circumstance I think very material. I do not consider that, in such a case as this, it would be consistent with general safety or propriety



1852.  
  
*Ex parte*  
PEMBERTON.

priety to direct taxation. We hardly differ from the Commissioner, because Mr. *Pemberton* did not attend before him. The reasons which I have given are mine. We both agree in the result.

*The* LORD JUSTICE LORD CRANWORTH.

I concur in the conclusion to which my learned Brother has arrived, and I confess that I entertain great doubt whether there is authority, in the absence of a case of fraud, to interfere under the summary jurisdiction which is given or regulated by the Act. The provisions of the 37th section are all directed to the taxation of bills remaining unpaid. Then the 41st clause is directed to bills which have been paid, and it contains this proviso : “ Provided the application for such reference be made within twelve calendar months from payment.” I doubt whether there was any jurisdiction to direct taxation ; but, if there was, certainly this does not appear to be a case for its exercise ; the bill having been paid seven months before another solicitor was appointed, and no proceedings having been taken for a year and a half after the application was made.

1852.

*Ex parte* WILLIAM BIRD and JOHN JERDEIN.

Dec. 6.

In the Matter of CHARLES FREDERICK CARNE  
and MAURICE TELO.

A QUESTION arose in this case as to the sufficiency of an affidavit under the 243rd section of the Bankrupt Law Consolidation Act 1849, which, after providing that affidavits to be made or used in matters of bankruptcy, or in any matter or proceeding whatever under the Act, shall and may be sworn in *England, Scotland, or Ireland*, as there mentioned, proceeds thus: "or elsewhere, before a magistrate and attested by a notary, or before a British minister, consul, or vice-consul."

Before *The*  
LORDS JUSTICES.

To comply with the 243rd section of the Bankrupt Law Consolidation Act, providing that affidavits may be made abroad before a magistrate and "attested" by a notary, it is not necessary that the notary should be present when the affidavit is sworn.

The affidavit purported to be sworn before a magistrate at *New York*, and there was a notarial certificate that the gentleman described in the jurat as a magistrate actually filled that office.

Mr. *Hugh Hill* and Mr. *Selwyn*, for the Respondent, objected that the affidavit was not "attested" by a notary, inasmuch as it did not appear that the notary was present when the affidavit was sworn.

Mr. *Rolt* and Mr. *Eddis*, for the Appellant.

The LORD JUSTICE KNIGHT BRUCE thought the attestation sufficient.

The LORD JUSTICE LORD CRANWORTH asked if there was any settled practice or authority upon the point;  
and

1852.  
*Ex parte*  
 BIRD.

and being informed that none had been found, his Lordship said that if there were no precedent the Court would make one in this case. That such a form of attestation was sufficient appeared plain. The legislature intended that affidavits should be sworn before some functionary duly authorized to receive them, and that where such functionary was a foreign functionary, the fact of his authority should be attested by the certificate of a notary. Where affidavits were made before a British minister, consul, or vice-consul, no notarial certificate was required; and the reason for that was, because the fact of such persons filling their respective offices was easily capable of proof, independently of any material attestation or certificate.

Dec. 22.

*Ex parte* FRANCESCO FRANCESCOVITZ  
 BRAGGIOTTI.

In the Matter of FRANK CASTELLI and FRANCESCO FRANCESCOVITZ BRAGGIOTTI; and in the Matter of FRANCESCO FRANCESCOVITZ BRAGGIOTTI.

AND

*Ex parte* FRANK CASTELLI.

In the Matter of FRANK CASTELLI.

Before *The*  
 LORDS JUSTICES.

The pendency of an appeal of two partners from a joint adjudication of bankruptcy against four, held not a sufficient ground for adjourning the allowance of the certificates of the other two.

THESE were two petitions by way of appeal from decisions of the Commissioner, postponing the allowance of the Appellants' certificates.

A separate petition for adjudication had been filed against each of the Appellants, and also a joint petition against

against the allowance of the certificates of the other two.

against them and their partners *Saverio Castelli* and *Giovanni Baptista Giustiniani*. Adjudications had been made on all these petitions, but the validity of the adjudication upon the joint petition, as regarded Messrs. *Saverio Castelli & Giustiniani*, was disputed before the Commissioner and on appeal before their Lordships, who directed the appeal to stand over, with liberty to bring an action (a).

1852.  
*Ex parte*  
 BRAGGIOTTI.

The action was brought immediately after the date of the order.

The Petitioners had filed their balance sheets, and on the 12th of *July* 1852 they passed their last examination, and the Commissioner appointed the 14th of *September* 1852 for a public sitting for the allowance of their certificates.

The action brought by *Saverio Castelli* and *Giovanni Baptista Giustiniani*, to try the validity of the adjudication of the 8th of *November* 1851, came on to be tried on the 9th of *July* 1852, when a verdict was taken for the plaintiffs, subject to the opinion of the said Court on a special verdict.

At the meeting on the 14th of *September* 1852 the petitioning creditors under the joint adjudication appeared to oppose the granting of a certificate to the Petitioner *Frank Castelli*, and the Commissioner adjourned the consideration of *Frank Castelli's* certificate until the 8th of *December* 1852, upon the ground that he would not judge of the objections thereto until after the validity of the adjudication of the 8th of *November* 1851 should be determined. On the same day the Commissioner also adjourned the consideration of the Petitioner

*Braggiotti's*

(a) See *Ex parte Castelli*, 1 *De G. Mac. & G.* 437.

1852.  
  
*Ex parte*  
BRAGGIOTTI.

*Braggiotti's* certificate, which was not opposed until the 8th of *December* 1852.

On the 8th of *December* 1852 the Petitioner and the petitioning creditors again appeared before the Commissioner, and submitted that at all events the application of Mr. *Braggiotti*, being unopposed, ought to be granted. The Commissioner, however, ordered and adjudged that the hearing for the allowance of both certificates should be adjourned till the last day of Trinity Term 1853, with liberty to apply for an earlier sitting, if the petition of appeal pending before their Lordships against the joint adjudication should be decided before such adjournment day. Against these orders of adjournment the Petitioners appealed.

Mr. *Rolt*, for the Appellant Mr. *Braggiotti*.

Mr. *Cairns*, for the Appellant Mr. *Frank Castelli*.

Mr. *Russell*, for the creditors opposing the certificate of Mr. *F. Castelli*.

THEIR LORDSHIPS made an order on Mr. *Braggiotti's* petition, granting him a certificate of the first class, on his undertaking to abide by such order as the Court might make on the joint petition for adjudication.

On Mr. *Frank Castelli's* petition their Lordships made an order, declaring that the pendency of the action, and the uncertainty whether *Saverio Castelli* and *Giovanni Baptista Giustiniani* were or were not legally bankrupts, did not form sufficient ground upon which the investigation or determination of the question, whether the Petitioner Mr. *Frank Castelli* was or not entitled to his certificate, should be delayed or adjourned ; and with that declaration their Lordships referred it back to the Commissioner to determine the right of the Petitioner to his certificate on the materials which existed.

AN  
INDEX  
TO  
THE PRINCIPAL MATTERS  
CONTAINED IN THIS VOLUME.

---

ACCOUNT.

See PRINCIPAL AND AGENT.

ADMINISTRATION OF  
ASSETS.

1. An administrator of an intestate died in 1817 indebted to a large amount in respect of his receipts as administrator, but leaving sufficient personal estate to pay this amount, and also leaving freehold estates. In the same year a suit was instituted for the administration of his personal estate, and in 1832, it appeared from the report in that suit, that his personal estate had been misapplied, and that his executor had become bankrupt. Thereupon, and in the same year (1832), an administratrix *de bonis non* of the intestate, instituted a suit against the administrator's heir and the sureties, in the usual administration bond,

and against the representatives of the Archbishop (who had died), praying to have the benefit of the bond, and to charge by means of it the administrator's freehold estates. No decree was made in this suit, the Plaintiff having married in 1838, and having died in 1847, without the suit having ever been revived. In 1848, another of the next of kin, who had been a Defendant to the suit of 1832, took out administration *de bonis non* of the intestate, and filed a bill of revivor and supplement to have the benefit of the suit of 1832.

*Held*, that the suit of 1832 must be considered as having been abandoned, and that the suit of 1848 must be considered an original suit, and as such barred by length of time and laches.

*Quære*. Whether the circumstance of the administrator dying largely indebted to the intestate's estate

was

was a breach of condition of the bond.

*Quære.* Whether the suit of 1832 was in its nature one which it was competent for the Plaintiff in that of 1848 to revive.

*Quære.* Whether either suit could be maintained upon the bond, the ordinary's personal representative not having declined to lend his name in an action. *Bolton v. Powell,* 1

2. An Insurance Company lent money on the security of a bond given by three obligors to two of the directors and of a policy effected with the Company by one of the obligors on his own life, and deposited as a collateral security. By the terms of the policy the insurance money was charged on funds and property of the Company only. The condition of the bond was for payment of the money lent, with interest, and of the premiums upon the policy. The Insurance Company was dissolved, their funds distributed, and their business transferred to another Company, to whom the obligees assigned the bond. One of the obligors who had not effected the insurance having died, and the policy having become forfeited for nonpayment of the premiums, the assignees of the bond debt sought to prove in the Master's office, under a decree for the administration of the estate of the deceased obligor. *Held,* that the proof ought to be admitted to the extent of an unpaid premium, which became payable

before the dissolution of the Company, although the dissolution took place long before the end of the year for which the premium was paid; but that no proof could be admitted for any premium the time for payment of which had not arrived when the Company was dissolved. *Atkinson v. Gylby,* 670

*See also* SOLICITOR, 1, 3.

TRUSTEE.

AFFIDAVIT.

*See* BANKRUPTCY, 19.

AGENT.

*See* PRINCIPAL AND AGENT.

ANNUITY.

*See* WILL, 7, 8, 9.

ASSIGNMENT.

The title of an assignee for value of an equitable interest is not affected by a previous insolvency of the assignor, the assignee having no notice of that insolvency.

The effect of the Act 7 Geo. IV. c. 57, is to vest in the assignee in insolvency all the property of the insolvent, but subject to all equities to which it would be liable in the hands of the insolvent. *In re Atkinson,* 140

BANKER.

A receiver of an estate, who had a private account at his bankers', opened

opened another there, under the name of the estate, under such circumstances as to inform the bankers that the money which would be paid in to that account would belong to the owner of the estate. The receiver drew a cheque on the estate account and paid it into his private account. *Held*, that the bankers were liable to repay the amount to the owner of the estate. *Bodenham v. Hoskyns*, 903

**BANKRUPTCY.**

1. In a case in which, under the Bankrupt Law Consolidation Act, the Commissioner had jurisdiction to make an order, the Court declined interfering in the first instance. *Ex parte Cheetham*, 223
2. Where a case is established of a trader having bought goods on credit, with the intent of raising money by pledging them, the Court will visit such conduct with the utmost severity; and the circumstance of goods which had been purchased on credit having been pledged the next day by the bankrupts is one open to suspicion.

Where, however, that circumstance was explained by uncontradicted evidence, showing that the goods had been purchased in the ordinary course of business, and had been pledged by reason of a sudden pressure requiring money to be raised forthwith, the Court allowed the bankrupts' certificates. *Ex parte Martyn*, 225

3. Where there was joint estate to the amount of 13*l.*, *Held*, that the joint

creditors could not receive dividends from the separate estate until all the separate creditors were paid in full, although it did not appear that after payment of costs any part of the 13*l.* would remain for distribution. *Ex parte Kennedy*, 228

4. Where bankers continued to trade for two years after they were hopelessly insolvent, *Held*, that their certificates had been properly refused; but by the consent of the assignees, and of the creditors opposing the certificate, protection was granted to them.

If bankers continue to receive deposits, knowing that if the business were wound up they could not pay 5*s.* in the pound, that is a trading which is utterly unjustifiable.

*Semble*, that the effects of the misconduct of a banker are such as to distinguish his case from that of other traders upon an application for a certificate. *Ex parte Rufford*, 234

5. A partner in a firm of two solicitors received monies belonging to the sister of the other, for the purpose of investment, and in a few instances without any specific security having been arranged. The usual charges of an attorney or solicitor were alone made upon the transactions. *Held*, that this did not amount to trading as a scrivener.

Uncontradicted general evidence of a course of dealing amounting to scrivening is sufficient to warrant an adjudication without proof of specific acts. *Ex parte Dufaur*, 246

6. Where



6. Where a bankrupt, who stopped payment on a Monday, had on the previous Saturday made purchases of goods, *Held*, that upon his application for his certificate, it was incumbent upon him satisfactorily to explain the circumstance; and, upon his giving an explanation which was incredible, and on it appearing from an inquiry into his previous career that he had twice before compounded with his creditors, and on this occasion wished to effect a third composition for 11s. in the pound, his assets being sufficient to pay 12s. in the pound, and upon it further appearing that he had made fictitious entries in his books, *Held*, that his certificate had been properly refused.

*Held*, also, that the question in such a case is not so much one of punishment as one of immunity, the question being, whether a trader who has so conducted himself shall be permitted to resume trading without paying his creditors. *Ex parte Curties*, 255

7. A trader who obtains money on false pretences, though not in the course of his trade, *Held* to have misconducted himself as a trader with reference to his certificate.

Misconduct as a trader before the 12 & 13 Vict. c. 106 came into operation may be properly regarded upon an application for a certificate under that Act. *Ex parte Staner*, 263

8. The Commissioners may appoint a sitting to consider the propriety of granting a bankrupt's certificate,

without any application on the part of the bankrupt. *Ex parte Sherlock*, 269

9. A shareholder in a joint-stock banking Company became bankrupt. Afterwards an order for the winding up the affairs of the banking Company was made. Subsequently the bankrupt obtained his certificate, and his name was afterwards included in the list of contributories. On a call being afterwards made, the official manager, by the Master's direction, applied to prove for the balance due from the bankrupt after debiting him with the call. *Held*, that the proof ought to have been admitted. *Ex parte Nicholas*, 271

10. A druggist assigned all the wares, fixtures, shop effects, stock in trade, furniture, goods, chattels, utensils, implements and things in, about, and belonging to the dwelling-house, warehouse, offices, and estate in his occupation by way of mortgage, to secure 150*l.* then advanced to him. The deed contained a proviso, that upon nonpayment of the 150*l.*, or of the interest, at the times mentioned in the deed, (but as to the interest after notice given) the mortgagee might enter upon the premises, and, if necessary, break or force open the door of any place wherein the goods should be, and might sell the goods and pay the mortgage debt, interest, and costs. More than a year after the expiration of the time appointed for payment of the 150*l.* the mortgagee took possession. On the

the following day the mortgagor committed an act of bankruptcy, and was a few days afterwards adjudicated a bankrupt.

*Semble*, that the mortgagee was not entitled to retain the goods unless it appeared that the mortgagor had at the date of the mortgage other property. *Ex parte Sparrow*,

907

11. Where all the calls upon the shares in a railway Company had been made, and a resolution had been passed that such of the shares as had been paid up should be converted into stock: *Held*, that they were stock within the meaning of the 20th section of the Bankrupt Law Consolidation Act, denying a certificate to a bankrupt who has lost 200*l.* within the year preceding the petition for adjudication upon a contract (not to be completed within a week) for the purchase of stock.

*Semble*, that the shares would have been within the meaning of the section even if they had not been converted into stock.

Although the words in the section are "a contract," a loss of the prescribed amount, arising upon an aggregate of contracts during the year, falls within its meaning.

In calculating the amount of loss, sums paid by way of commission upon continuations are to be included.

The time of the resale is that of the loss.

A repealed statute in *pari materia* with an existing one may

properly be referred to for the purpose of construing the latter. *Ex parte Copeland*,

914

12. After an action of trover had been brought by assignees to recover from a mortgagee goods alleged to be in the reputed ownership of the bankrupt, the assignees applied to the Commissioner for an order for a sale of the goods, as in *Ex parte Heslop*. The Commissioner declined to make the order on an *ex parte* application, and gave the assignees leave to serve the defendant in the action with notice of the application. On his attending by counsel, and objecting to the order being made, the Commissioner refused the application, with costs. On appeal, *held* that the proper course of the assignees was to have appealed from the refusal to make the order on an *ex parte* application. *Ex parte Barlow*,

921

- 13 One of the residuary legatees under a will was the surviving trustee of it. The other was subsequently appointed a new trustee under a power, the trust estate then consisting of 9000*l.* due from the continuing trustee, and of shares in a Company, valued at 6000*l.*, which were transferred into the names of the two. After the death of certain *cestuis que trustent* who were entitled for life, and when the trust estate constituted a clear fund belonging in moieties to the two residuary legatees, subject only to the payment of legacies, which amounted to 4000*l.*, the continuing trustee

mand, pay the new firm or the creditors of the old firm the amount of the excess. The debts exceeded the stipulated amount. *Held*, that the excess did not constitute a good petitioning creditor's debt against the father, or more than a claim for unliquidated damages. *Ex parte Broadhurst*, 953

18. The solicitor to the fiat having delivered his bill of costs, and retained the amount of it before the end of 1850, was discharged in *July* 1851. No application for taxation was made before *October* 1852. *Held*, that it was not consistent with safety or propriety to direct taxation in a summary way, even if the Court had jurisdiction to do so. But *semble per* Lord *Cranworth*, that the Court had no such jurisdiction. *Ex parte Pemberton*, 960

19. To comply with the 243rd section of the Bankrupt Law Consolidation Act, providing that affidavits may be made abroad before a magistrate, and attested by a notary, it is not necessary that the notary should be present when the affidavit is sworn. *Ex parte Bird*, 963

20. The pendency of an appeal of two partners from a joint adjudication of bankruptcy against four, *held* not a sufficient ground for adjourning the allowance of the certificates of the other two. *Ex parte Braggiotti*, 964  
See also HUSBAND AND WIFE, 2.

#### BOND.

See ADMINISTRATION OF ASSETS, 1, 2.

#### CALL.

See WINDING-UP ACTS, 5, 10.

#### CAVEAT.

See PATENT, 2.

#### CERTIFICATE.

See BANKRUPTCY, 2, 4, 6, 7, 8, 11, 15, 20.

#### CHEQUE.

See PUBLIC COMPANY, 3.

#### CLUB.

Clubs are not partnerships or associations within the meaning of the provisions of the Joint-stock Companies Winding-up Acts. *In re St. James's Club*, 383

#### COMMITTEE.

See LUNACY, 2, 3.

#### COMMITTEEMAN.

See WINDING-UP ACTS, 1.

#### COMPROMISE.

A tenant for life of a coal-mine filed a bill, setting out documents which showed this to be the state of his title, but by mistake alleging that he was tenant in tail. The prayer of the bill was to restrain the lessees of a conterminous mine from trespassing upon his mine, and to obtain an account and payment of the proceeds of their alleged wrongful workings in it. After an interim order was obtained the suit was compromised in October under an agreement

agreement, whereby the Defendants were to pay the Plaintiff 400*l.*, which he agreed to accept for the full value of all coals to be raised from the mine in question, with costs to be taxed in the then next Michaelmas Term, and if reasonable security to the Plaintiff's satisfaction were given, six months were to be allowed for the payment. *Held*,

That the erroneous allegation of title in the bill could not be regarded as having led to such a misapprehension of it, as would prevent a Court of Equity from enforcing the agreement for compromise :

That under the agreement the Defendants were not entitled to have the Plaintiff's title deduced and verified :

That the compromise could not be enforced by petition in the original suit, but that a new suit was properly instituted for this purpose.

*Richardson v. Eyton*, 79

### CONTRACT.

Where persons sign a written agreement and there has been no fraud or mistake, the written agreement binds at law and in equity according to its terms, although verbally a provision was agreed to which has not been inserted in the document; subject to this, that the Defendant in equity may call upon the Court to be neutral unless the Plaintiff will consent to the omitted term.

Where, therefore, the Defendants agreed in writing to grant a Plaintiff a lease at a specified rent and

for a specified term, subject to the same covenants, clauses, and agreements as were contained in an expiring lease under which he then held the property, and the Plaintiff filed a claim for specific performance, stating the above agreement, and that it was further agreed that he should pay a premium of 200*l.*, which by his claim he offered to do: *Held*, reversing the Vice-Chancellor's decision, that this additional term did not render the Statute of Frauds a valid defence to the claim.

Other defences having been set up as to the agreement having been unduly obtained, on which no decision had been given below, but which failed on appeal: *Held* that, although the decree was one of reversal, the Defendants must pay the costs of a *vivá voce* examination, rendered necessary by these defences before the Appeal Court, the examination taking the place of an issue.

Where intended lessors, in executing an agreement for a lease, acted partly upon a representation by the lessee as to what had taken place between their own solicitor and him in its preparation, and their attention was immediately afterwards directed to the point whether this representation was correct, but they took no step to question it for three years afterwards: *Held*, that the delay was strongly confirmatory of the fairness of the transaction. *Martin v. Pycroft*, 785

*See also* SHIPPING.

CONTRIBUTORY

**CONTRIBUTORY.**

*See* WINDING-UP ACTS.  
BANKRUPTCY, 9.

**COPYHOLDS.**

*See* WILL, 10.

**COSTS.**

*See* CONTRACT.  
PLEADING, 2.  
PRACTICE, 8, 13, 16.  
SOLICITOR.

**COVENANT.**

*See* BANKRUPTCY, 16.  
INJUNCTION, 2.

**CY PRES, DOCTRINE OF.**

*See* WILL, 1.

---

**DEBT, RELEASE OF.**

*See* INJUNCTION, 1.

**DECISIONS OBSERVED UPON.**

*See* DEED, 1.  
PRINCIPAL AND SURETY.  
WILL, 1, 4, 8.

**DEED.**

1. By indenture of settlement, two estates, A. and B., were limited to the father for life, and subject thereto the estate A. was limited to the first and other sons in tail male, and the estate B. was limited to the second and other sons in like manner; and it was provided

that if the second son should become an eldest son and as such should become entitled to the actual possession or to the receipt of the rents and profits of the estate A., the limitations of the estate B. should cease and determine as if such second son were dead without issue: the second son, by the death of his elder brother, became the eldest son and joined his father in suffering a recovery of the estate A., the uses of which were declared to the joint appointment of the father and son and subject thereto to the old uses: in exercise of this power, the father and son by a mortgage in fee of the estate A. raised a sum of money, which was paid to the father and son: *Held*, that on the death of the father, the estate B. shifted from the second son under the terms of the proviso contained in the settlement.

*Held* also, that the recovery suffered by the father and son did not by itself prevent the operation of the proviso, and that the mortgage had not that effect, but that, notwithstanding both the recovery and the mortgage, the second son came on the death of his father into possession of the estate A. within the meaning of the terms of the settlement.

*Held* also, that the party entitled to the estate A. might previously to the happening of the event mentioned in the proviso have so exercised his rights over the estate as to have prevented it from ever coming

**DOWER.**

*See* HUSBAND AND WIFE, 1.

---

**ELECTION.**

*See* WILL, 14.

**EQUITY, JURISDICTION IN.**

*See* PUBLIC COMPANY, 5.  
SHIPPING.

**EVIDENCE.**

*See* PRACTICE, 12.

**EXECUTOR.**

1. The survivor of two executors, who had taken out administration to the other, filed a bill to set aside a mortgage of part of the assets made by the deceased executor as having been a breach of trust. *Held*, that his having taken out the administration did not disqualify him from maintaining the suit.

It is not enough to impeach a mortgage of part of the assets, that it was made to secure a debt originally contracted on the personal security of the executor, and without reference to the assets. *Miles v. Durnford*, 641

2. By admitting assets, the executor of an executor renders himself liable to the same decree as the executor himself, if living, would have been liable to in respect of the personal estate of the original testator. *Davenport v. Stafford*. 901

*See also* WINDING-UP ACTS, 3, 6, 7.

**FACTORS ACT.**

*See* PRINCIPAL AND AGENT.

**FEME COVERT.**

*See* PRACTICE, 1, 17.

**FORMA PAUPERIS, SUING IN.**

*See* PRACTICE, 17.

**FRAUDS, STATUTE OF.**

*See* CONTRACT.

---

**GUARDIAN.**

*See* PRACTICE, 11, 20.

---

**HUSBAND AND WIFE.**

1. By a settlement made on the marriage of an adult female, it was declared that in consideration of the intended marriage, and "for providing a competent jointure and provision of maintenance for" the wife and issue of the marriage, the father of the husband had paid him 3000*l*.; and that the husband had given a bond for the payment of 2000*l*. six months after the marriage, to be settled on trusts for the benefit of himself, his wife, and the issue of the marriage. During the coverture, the husband bought certain lands, which he subsequently sold to a purchaser, from whose devisees the defendant purchased with notice of the settlement. The husband died without satisfying the bond. On a bill by the wife for dower

dower out of the lands so sold: *Held*, that her right was barred by the settlement, and that she had no lien on, or right to resort to, the lands for the satisfaction of the amount due on the bond. *Dyke v. Rendall*, 209

2. The Court, under the circumstances of the case, directed the whole of a trust fund, claimed by the assignees in bankruptcy of the husband in right of his wife, to be settled for the benefit of the wife and children. *Dunkley v. Dunkley*, 390

### INJUNCTION.

1. During a treaty for a marriage, which afterwards took place, a bond creditor of the intended husband, who was an intimate friend of his family, and was aware of the proposed marriage, repeatedly declared it to be her determination never to enforce payment of the bond debt, and made these declarations under circumstances which were calculated to lead, and which did lead, to the communication of them to the friends of the intended wife. *Held*, by the Lord Justice *Knight Bruce*, agreeing with the Master of the Rolls, that the declarations above mentioned afforded possibly sufficient ground for the interposition of a Court of Equity to restrain proceedings at law upon the bond, and there being, in addition, the testimony of one witness to a positive promise to the above effect, in consideration of another promise on

the part of the witness, which he performed: *Held*, that although this promise was denied by the answer, yet that the answer being in many respects inaccurate, showed that the Defendant's memory could not be depended on, so that the testimony of the witness ought to prevail; and that the case was a proper one for a perpetual injunction, a decree for which was accordingly affirmed, *dissentiente* Lord *Cranworth*, who held, that the declarations being of intention merely, and not of fact, were not such representations as to bind the creditor, on the ground of fraud or otherwise, and that an actual contract could not, in opposition to the answer, be considered proved by the evidence of one witness.

*Held*, that forbearance to make a new settlement upon an intended marriage, would be a sufficient consideration to support the release of a debt due to a person who was a *cestuis que trust* under an existing settlement, which appeared to be voluntary, although it might be doubtful whether that settlement was voluntary, or could have been defeated by a subsequent settlement. *Money v. Jordan*, 318

2. On a sale by a wine merchant of his stock in trade and business, he covenanted that he would not set up or carry on at C., or in any other place within the counties of C., A., or M. the business of a wine and spirit merchant. The vendor gave up his place of business at C. and had no place of business within the proscribed



proscribed district, but he solicited, and obtained, orders within it.

*Held*, by Lord *Cranworth*, confirming the decision of the Vice-Chancellor *Kindersley*, that the question, whether this was a breach of the covenant, was too doubtful to entitle the Plaintiff to an injunction without bringing an action. But,

*Held*, by the Lord Justice *Knight Bruce* and the Court of Queen's Bench, that it was a breach of the covenant. *Turner v. Evans*, 740

3. Upon the purchase of a steam-vessel, it was agreed among the purchasers that two of them should be the ship's husbands, and should not be removed except on certain grounds specified in the agreement. The ship's husbands thus appointed obtained a charter-party for her, and they privately stipulated for a weekly payment, by way of commission for themselves, in addition to the weekly sum payable by the terms of the charter-party. In the month of *May* following, the captain, who was a part owner, had a conversation with a clerk of the charterers, in which an observation of the latter led him to suspect that there was some underhand bargain; but the subsequent part of the conversation removed the suspicion. In *October* he acquired correct knowledge of what had been done, and, together with the other part owners, except the ship's husbands, gave the ship's husbands notice of dismissal. The ship's husbands denied the right to dismiss them,

and they possessed themselves of some of the machinery of the ship, which was at an engineer's for repairs. The other part owners thereupon filed a bill, and moved for an injunction to restrain the ship's husbands from interfering with her sailing by detention of the machinery, and for a receiver of the machinery.

*Held*, that the application was not too late; and, on it appearing that a decree of possession could not be obtained in the Court of Admiralty, by reason of the Plaintiffs being in possession of the hull, or at all events could not be obtained in time to enable the vessel to fulfil her engagement: *Held*, that the Court of Chancery had jurisdiction upon motion to appoint a receiver of the machinery, and to direct possession of it to be delivered to him; and an order was made accordingly, the captain being appointed receiver *ad interim*. *Brennan v. Preston*, 813

4. Before this Court interposes upon an interlocutory application to stay proceedings in a suit by reason of a decree or judgment in a foreign country, it must be satisfied that the foreign decree or judgment does justice and covers the whole subject of the suit. *Ostell v. Le Page*, 892

*See also* PATENT, 1.

---

## ISSUE, DIRECTING.

*See* PRACTICE, 1, 8.

JOINT



JOINT AND SEPARATE  
ESTATE.*See* BANKRUPTCY, 3.

## JOINT-STOCK COMPANY.

*See* MORTMAIN.JOINT-STOCK COMPANIES  
WINDING-UP ACTS.*See* WINDING-UP ACTS.LANDS CLAUSES CONSOLIDA-  
TION ACT.*See* PUBLIC COMPANY, 2.

## LEASE.

*See* CONTRACT.

## LEGACY.

*See* WILL.

## LORDS JUSTICES.

*See* TRUSTEE ACT, 1.

## LUNACY.

1. Where a Defendant of unsound mind, not found so by inquisition, was entitled to a capital sum, the income of which was insufficient for the maintenance, the Court directed nearly the whole of it to be laid out in the Defendant's name in purchase of a government annuity, and that the income should be applied for her maintenance. A vice-chancellor has jurisdiction to make such an order. *Davies v. Davies*, 51
2. Where a committee of the estate of a lunatic permitted the solicitor

whom he employed in the lunacy to become tenant of a mansion-house, forming part of the lunatic's estate, and allowed the rent to be in arrear for four years, none having, in fact, been paid, except by means of a set-off of a smaller sum, being the amount of the solicitor's bill of costs accruing from time to time: *Held*, that the committee was personally liable to make good the deficiency. *Ex parte Swindell*, 91

3. Where one of two committees of a lunatic's estate had died, and the property was very small, the Court, without a fresh reference to the Master, ordered the income to be paid to the surviving committee on evidence of his solvency. *In re Noble*, 280

*See also* TRUSTEE ACT, 1.

## MARRIAGE SETTLEMENT.

*See* DEED, 2.

HUSBAND AND WIFE, 1.

## MISDESCRIPTION.

*See* VENDOR AND PURCHASER, 2.

## MORTGAGE.

*See* BANKRUPTCY, 10.

## MORTMAIN.

Bequest of shares in a joint-stock bank, the assets of which were by its deed to be deemed personal estate, and which consisted of freehold and copyhold estates and money due upon mortgage of free-freehold, copyhold, and leasehold hereditaments:

hereditaments: *Held*, not to be within the Statute of Mortmain.

Observations of Lord *Truro* upon joint-stock companies established by charter, statute, and deed, and upon the distinction in effect between a provision by deed or statute constituting a joint-stock company, whereby its assets are to be deemed personal estate; and *semble per eundem*, that there is nothing in the Statute of Mortmain, from which it is to be inferred that partnerships, consisting of numerous individuals and possessing real estate, are to be exempt from its operation. *Myers v. Perigal*, 599

#### MUNICIPAL CORPORATION ACT.

By letters patent in 1637, the mayor, recorder, aldermen, and common council of the city of *E.* were incorporated and constituted the Governors of the Hospital of *J.* and of its lands, revenues, and goods, with power to purchase and take other lands, and to have a common seal. The recorder was not a member of, though elected by, the corporation of the city. *Held*, that since the passing of the Act 5 & 6 *Will. IV.* c. 76, the corporation of the hospital was so far identical with the municipal corporation, as to be within the spirit, if not the letter, of the 71st section of that Act, and therefore (without deciding whether the corporation of the hospital any longer existed, or in whom the legal estate of the hospital lands was vested) that the administration

of its trust estates was rightly transferred to the trustees, appointed under that Act, of the charitable estates of the municipal corporation. *Attorney General v. The Mayor, &c. of Exeter*, 507

#### PARTNER.

See *BANKRUPTCY*, 17.

#### PATENT.

1. Where a patent had been in force for twelve years, and had been the subject of four suits against different persons, all of which terminated favourably to the patentee, and in two of which verdicts had been given in favour of the validity of the patent: *Held* that, in a fifth case, the patentee was entitled to an injunction pending the trial of the legal right, although a fresh fact was brought forward, tending to impeach the novelty of the invention. A patentee does not acquiesce in the infringement of his patent by omitting to proceed by *scire facias* to set aside a subsequent patent extending to part of his invention, unless such subsequent patent is put in practice.

An allegation as to the Defendant's inability to be answerable in damages, *held* not irrelevant upon a motion for an injunction against the infringement of a patent. *Newall v. Wilson*, 282

2. Where a caveat was lodged before the great seal was affixed to a patent, the Lord Chancellor declined to enter

enter into the merits of the opposition, but referred the matter back to the Attorney-General. *In re Fawcett's Patent*, 439

## PAYMENT OF MONEY INTO COURT.

See PRACTICE, 17.

## PERPETUITY.

See WILL, 1, 4.

## PETITION.

See PRACTICE, 1.

## PLEA.

See PLEADING, 1.

## PLEADING.

1. The plaintiff claimed, as heir-at-law of *A.*, who, as the bill alleged, when in very embarrassed circumstances had executed a voidable conveyance to his solicitor. The bill, after stating a pretence on the part of the Defendants, who claimed under the solicitor, that *A.* had confirmed the conveyance by his will, charged that he had died intestate as to the premises in question, and prayed that the conveyance and any testamentary disposition by him in confirmation thereof might be declared null and void. Plea, that *A.* by will, after reciting the probability of the conveyance being disputed, had ratified and confirmed it, allowed.

Assuming that the conveyance was voidable, the interest which remained in *A.* after its execution was

not a right of entry under the old law, but an equitable estate which was clearly devisable. *Stump v. Gaby*, 623

2. Although there is no rule that in every instance in which a Defendant takes several grounds of defence, one tenable and successful, the rest doubtful or invalid, that circumstance ought to avail the Plaintiff on the subject of costs; yet where, upon the evidence, the Plaintiff's case failed absolutely and wholly as a case for equitable relief, but the Defendant had in the suit endeavoured to support claims without any just foundation, and had vexatiously disputed the legal title of the Plaintiff: *Held*, that the bill ought to be dismissed without costs. *Clowes v. Beck*, 731

See also ADMINISTRATION OF ASSETS, 1.  
COMPROMISE.

## PLEDGE OF GOODS.

See PRINCIPAL AND AGENT.

## POWER.

See WILL, 5, 6.  
DEED, 2.

## PRACTICE.

1. At the hearing of a suit to establish a will, an issue was directed at the instance of the heiress at law, who was a married woman. Before any trial she and her husband presented a petition, stating that at the urgent request of their children (who were devisees), they had agreed

to

to withdraw all opposition to the will, upon being allowed their costs, and praying that the order directing the issue might be discharged upon these terms. Upon this petition, an order was made according to the prayer, and purporting to be made upon the consent of the married woman by her counsel. Subsequently a private Act of Parliament was obtained authorizing leases to be made of the devised estates. The married woman was one of the petitioners for the Act, and was excepted from the saving clause, and the Act recited the will, and proceeded upon the assumption of its validity. Some years afterwards the married woman presented a petition to rehear the cause. This petition was entitled in the cause and in the matter of the private Act. It stated the subsequent transactions, but not the provisions of the Act.

*Held*, that the preceding transactions did not constitute grounds for taking the petition off the file, and that such grounds were not afforded by the introduction into the petition of statements as to the matters occurring since the hearing, or by the petition being entitled in the matter of the Act, or by the omission to set out in it the Act itself, especially upon appeal, when these objections of form had not been insisted upon in the Court below.

*Held* also, upon the rehearing, that the order discharging the direction for an issue was not bind-

ing upon the wife, but was upon the husband.

*Semble, per Lord Cranworth*, that if at the hearing a married heiress at law does not ask for an issue, she is bound by the decree. *Turner v. Turner*, 28

2. Where a written bill for an injunction has been filed with a proper stamp, the requisite printed copy may be filed without stamp, and both ought to remain on the file. *Jones v. Batten*, 111

3. A printed bill ordered to be received and filed, although a mistaken transposition of the names of one of the parties had been corrected in ink. *Yeatman v. Mousley*, 220

4. The 52nd section of the Chancery Practice Amendment Act, 15 & 16 Vict. c. 86, providing that upon a suit becoming defective by reason of transmission of interest, an order to the effect of the usual supplemental decree may be obtained as of course upon an allegation of the transmission of interest, applies to cases where the rights of the Plaintiff are affected by a settlement, executed after the institution of the suit. *Atkinson v. Parker*, 221

5. Where the Plaintiff omitted to prosecute an order upon a claim, *Held*, that the Court might give a Defendant leave to sue out writs of summons to bring before the Master the parties required by the terms of the order. *Turnbull v. Warne*, 281

6. On an appeal from the whole of an order made upon a claim, the Plaintiff

Plaintiff has the right to begin.  
*Sims v. Helling*, 291

7. A bill was filed by *cestuis que trustent* to administer the trusts of a settled fund, and seeking to charge the estate of a deceased trustee with sums which he might have received but for his wilful default. At the hearing, the ordinary accounts were only directed, and no inquiry was directed or reservation made with reference to wilful default. In the course of the inquiries in the Master's office some documents were in evidence, which were relied upon by the Plaintiffs, as leading to an inference that the trustee might have received more than was admitted to have been actually invested on account of the trust fund. *Held*, that it was not proper, on further directions, to direct an inquiry as to wilful default.  
*Coope v. Carter*, 292

8. As a general rule, where a Plaintiff's title to equitable relief depends on a legal right, on the establishment of such right, either by an action or an issue, he will be entitled to the costs both at law and in equity. After an issue had been directed and found in favour of the Defendant, the Plaintiff applied for a new trial, which was refused; the cause was then brought to a hearing, when the bill was dismissed with costs. The Plaintiff then appealed from the decree, as well as the order refusing the new trial. On that appeal the bill was retained for a year, with liberty for the Plaintiff to bring an action.

An action was accordingly brought, and a verdict was found in the Plaintiff's favour; but a new trial of the action was subsequently granted, on the ground of misdirection of the Judge. The Plaintiff having been successful in the second action, the cause was brought before the Vice-Chancellor *Knight Bruce*, on the equity reserved, when he made a decree in conformity with the result of the trial at law, but did not think fit to make any order as to costs: *Held*, on an appeal from that decree, that the appeal involved so much of principle as to render it an exception to the ordinary rule, which prohibits an appeal for costs alone.

Under the circumstances of this case, *Held* that the Plaintiff was not entitled to the costs of the issue, nor of the first trial of the action, nor of so much of the costs of the suit as was occasioned by his having brought the cause to a hearing without appealing from the order refusing the new trial of the issue, but that he was entitled to all the other costs. *The Corporation of Rochester v. Lee*, 427

9. The attorney of the Plaintiffs in an action communicated to the Plaintiffs in another action against the same Defendant and involving substantially the same question, a case and opinion taken on behalf of the Plaintiffs in the former action, with permission to copy it. The Defendant in the actions filed a bill of discovery against the Plaintiffs to whom the case and opinion had been

- been lent: *Held*, that they could not be compelled to produce the copy which they had made. *Enthoven v. Cobb*, 632
10. After a report in favour of the title in a specific performance suit, the Defendant died. Upon a motion by his executors and devisees in trust, the Court ordered that if the Plaintiff did not revive within six weeks, the bill should stand dismissed. *Norton v. White*, 678
11. Guardian of an infant defendant *ad litem* appointed without a commission. *Egremont v. Egremont*, 730
12. Extracts from parish registers signed by persons, describing themselves in such signatures as "rectors" or "vicars," *held* sufficient within 14 & 15 *Vict.* c. 99, but not where the description was "incumbent" or "curate" without further evidence. *In re Hall's Estate*, 748
13. Where a Plaintiff, not being in public service, goes abroad pending a suit and remains there under such circumstances as to render it probable he will not be forthcoming when the Defendant may be entitled to call upon him to pay costs, the Court will direct him to give security for costs. *Blakeney v. Dufaur*, 771
14. Where, after fully hearing a case before the Lords Justices, they differ and pronounce judgment, the decision below is affirmed. A rehearing before the full Court will not in general be directed. *Blann v. Bell*, 775
15. Under the new practice an order to revive a creditor's suit may be made at the instance of a creditor to whom a debt is found due by the Master. *Lowes v. Lowes*, 784
16. *Quære*, if there is any such rule as that a successful appellant shall in no case have his costs of the appeal from his opponent. *Martin v. Pycroft*, 785
17. Where it appeared that the next friend of a *feme covert* Plaintiff was insolvent, and was in contempt for nonpayment of costs, she was discharged from being next friend without prejudice to her liability already incurred; and all proceedings were stayed until a new and sufficient next friend should be appointed, or the Plaintiff should have obtained an order to sue in *formâ pauperis* without a next friend.
- An order may be made for payment of money into Court, although some of the persons interested in the money are not before the Court. *Wilton v. Hill*, 807
18. The dismissal of a bill does not prejudice the right to file another for the same purpose under a different state of circumstances. *The Mayor, &c., of Liverpool v. The Chorley Waterworks Company*, 852
19. Upon the hearing of an argument upon a point of law with the assistance of a common law judge, only one counsel is heard on each side. *Jones v. Beach*, 886
20. A guardian to an infant defendant of unsound mind, not so found by

by inquisition, should be appointed by the Court of Chancery, and not under the jurisdiction in lunacy.

*Pidcock v. Boulton*, 898

21. Delivery of a copy of the interrogatories to a bill by leaving it at the office of the Defendant's solicitor, without being served on the solicitor personally, *held* sufficient under the 12th section of the statute 15 & 16 *Vict.* c. 86. *Bowen v. Price*, 899

22. When an order of reversal upon appeal rested in minutes, and the counsel for the respondent stated that material considerations had not been brought before the Court, the Court acceded to a motion for rehearing, although twenty-one days had elapsed; but whether such rehearing was a matter of right, *Quære. Ex parte Turner*, 927

*See also* PLEADING.

#### PRINCIPAL AND AGENT.

Under the Factors Act, 5 & 6 *Vict.* c. 39, a contract with an agent for the pledge of goods will be valid as against the principal, though the person dealing with the agent knows him to be only an agent in respect of the goods pledged, provided that the person so dealing acts *bond fide* and without notice that the agent is acting *malá fide* and beyond his authority.

To deprive the pledgee of the protection of the Act, he must be fixed with knowledge that the agent is so acting as above stated, and no mere suspicion will amount

to notice; nor will the knowledge that the agent has power to sell the goods constitute notice that he has not power to pledge them.

A bill for an account by a principal against his agent is not necessary where the transaction to which it relates is a single transaction and untainted by fraud. *Navulshaw v. Brownrigg*, 441

#### PRINCIPAL AND SURETY.

A surety, who as such was indebted together with his principal upon a joint note, received from the holder a letter, stating that the holder was about to make the principal a bankrupt, but could not proceed without joining the surety, and asking whether the surety would join the principal in a fresh note payable jointly and severally. The surety's solicitor answered that the surety would in a post or two pay the amount and interest due on the joint security. *Held*, that the contract was not changed, and that the surety had, neither at law nor in equity, rendered himself severally liable.

*Quære*, whether the *dicta* in *Thorp v. Jackson*, 2 *Younge & Collyer*, *Exch.* 561, can be supported, and whether a joint loan creates in equity a joint and separate liability. *Jones v. Beach*, 886

#### PRODUCTION OF DOCUMENTS.

*See* PRACTICE, 9.

PUBLIC



PUBLIC COMPANY.

1. By the rules of a foreign Railway Company, established as a Société Anonyme, it was provided that the general meeting convened by notice should represent the whole body of shareholders, and should take cognizance of the accounts and balances, and that their approval of the balances should completely discharge the board of directors. Two of the English directors retired in consequence of the small amount paid up. Afterwards, by the sanction of the solicitor appointed by the committee of management, they returned to several English subscribers the amount of their deposits without interest, and bought up the shares of others, and paid over the balance of the deposits in their hands to the continuing directors of the Company, who received it and sanctioned the transaction. Some shareholders on behalf of themselves and the others filed a bill against the directors, alleging that the Company had carried on their affairs in conformity with the rules, and praying that the two retired directors might make good the returned deposits. It appeared that the accounts had been fairly submitted to the general meeting, and passed. *Held*, that the general meeting had power to sanction and had sanctioned the proceedings, and that the bill had been properly dismissed. *Kent v. Jackson*, 49
2. The special Act of a Railway Company incorporated so much of

the Lands Clauses Consolidation Act as was not inconsistent with it. It also provided that such parts of the line as passed through a certain specified piece of land should be arched over, so as to afford to the owner a communication between the severed portions. *Held*, that this provision was not inconsistent with and therefore did not exclude the operation of s. 92 of the Lands Clauses Consolidation Act, which provides that no party shall be required to sell part of a manufactory if he shall be able and willing to sell the whole.

Land included in the same wall with tin-plate works, and used for the deposit of ashes from the works: *Held*, to be part of a manufactory within the 92nd section of the Lands Clauses Consolidation Act, although the two portions of the property were separated by a road over which a stranger had a right of way.

Where a Company had given notice to take part of a manufactory, and were required to take the whole under the above section: *Held*, that they could not escape from the necessity of so doing by changing their plan, and passing under the part comprised in their notice by a tunnel, whether such a proceeding would amount to taking a part of the manufactory or not.

*Semble*, that it would amount to taking a part of the manufactory. *Sparrow v. The Oxford, Worcester, and Wolverhampton Railway Company*, 94



3. A railway Company had entered into an agreement with a landowner for the purchase of land A. They found that they did not at the time require this land, but required immediately land B. belonging to the same landowner. He consented to sell them B., if they would at the same time pay for A. The finance committee of the Company drew a cheque for the price of A. and another for the price of B., and left the chairman to make the best arrangement he could with the landowner. The agent of the landowner received both cheques, upon an agreement that the cheque for B. should not be presented for a week, to give time for the completion of a more formal agreement as to the purchase of A. than that which had been executed. The preparation of the agreement having been delayed beyond the week, communications took place between the chairman of the finance committee (who was one of the drawers of the cheque) and the landowner's solicitor, in which the former desired that the cheque might continue to be retained as the agreement was not completed.

It appeared from the books of the Company, that the fact of the cheque being outstanding had been the subject of discussion in the finance committee, and had been considered by them unsatisfactory. Before the execution of the agreement, and before the presentation of the cheque, the bank failed on

which it was drawn, and in which the chairman was a partner. *Held*, that, whether the chairman, in desiring the presentation of the cheque to be delayed, was acting *ultra vires* or not, his act was sanctioned by the committee and bound the Company, and that the Company, and not the landowner, must bear the loss.

But *semble*, that the chairman was not acting *ultra vires*, being one of the drawers of the cheque.

The cheque was not dated as drawn at any place, but was headed with the name of the railway. *Held*, that this did not indicate any place so as to satisfy the terms of the clause in the Stamp Act exempting cheques from duty; but that the cheque was void, and that on this account, independently of any other, the loss must be sustained by the Company. *Lord Ward v. The Oxford Railway Company*, 750

4. Persons obtaining from the legislature power to interfere with the rights of property, are bound strictly to adhere to the powers so conceded to them to do no more than the legislature has sanctioned, and to proceed only in the mode which the legislature has pointed out; but (except in a proceeding at the instance of the Attorney-General) any one seeking the assistance of a Court of equity, to restrain the violation of such a contract with the legislature, is bound to show that he has a private interest in the matter.

Therefore,

Therefore, where a Waterworks Act empowered a Company to divert the water of a stream (without limit as to quantity), by means of an open channel filled with loose stones and they were diverting it by means of a culvert: *Held*, that another Company who were entitled to the water of a stream into which the diverted stream had flowed were not entitled to an injunction to restrain a violation of the terms of the Act as to the mode of diversion. *The Mayor, &c. of Liverpool v. The Chorley Waterworks Company*, 852

5. The Court is not exceeding its functions in deciding a purely legal question arising in a suit before it, either with or without legal assistance, but ought to decide such a question where the controversy and material facts are plain.

A railway, associating, allying, and connecting itself with another, does not thereby become equitably "amalgamated" with it.

An agreement to amalgamate as from a time past may possibly in equity amount to amalgamation; but an agreement to do so at a future period will not, until that period arrives.

Pending the progress of a bill through Parliament, authorizing the *S. F.* Company to lease their line to the *N. W.* Company, the bill was opposed by the *S. B.* Company, and, upon a compromise, a clause was inserted, securing to the *S. B.* Company the use of part of the line and the joint use of a station, subject to the cesser of these

rights in the event of the *S. B.* Railway Company being leased to or amalgamated with a fourth Company, viz. the *G. W.*, who were rivals to the *N. W.* Company. At this time the *S. B.* Company was under no engagements to the *G. W.* Company. Subsequently, however, those two Companies entered into agreements, giving facilities and preference to each other's traffic, and agreed to amalgamate at a future time, if the sanction of Parliament could be obtained. *Held*, that this was not such a change of circumstances produced by the conduct of the *S. B.* Company as to exclude them from equitable relief by injunction for the enforcement of the right of user conferred on them by the Act.

The Court may interfere between two Railway Companies entitled to the joint use of a station by prescribing regulations for its management; but such interference ought not to take place without grave occasion. The Court may also direct a partition of the station, and appoint a receiver if necessary. But where provisions exist for the settlement of disputes on the above subjects by arbitration, the Court will withhold its interposition until the remedy thus provided has been resorted to. *The Shrewsbury and Birmingham Railway Company v. The Stour Valley Railway Company*, 866

RAILWAY COMPANY.

See PUBLIC COMPANY.

RECEIVER.

**RECEIVER.***See* INJUNCTION, 3.**REHEARING.***See* PRACTICE, 1, 14, 22.**RELEASE.***See* INJUNCTION, 1.**REVERSIONARY INTEREST.***See* VENDOR AND PURCHASER, 1.**REVIVOR.***See* ADMINISTRATION OF ASSETS, 1.  
PRACTICE, 10, 15.**REVOCATION OF WILL.***See* WILL, 12.**RIGHT TO BEGIN.***See* PRACTICE, 6.

---

**SCRIVENER.***See* BANKRUPTCY, 5.**SECURITY FOR COSTS.***See* PRACTICE, 13.**SETTING ASIDE SALE.***See* VENDOR AND PURCHASER, 1.**SHAREHOLDER.***See* BANKRUPTCY, 9.**PUBLIC COMPANY.****WINDING-UP ACTS.****SHIFTING CLAUSE.***See* DEED, 1.**WILL, 1.****SHIPPING.**

1. An unregistered contract for the sale of shares in a British vessel cannot be enforced in equity. *Hughes v. Morris*, 349
2. The provisions of the Ship Registry Acts apply equally to contracts as to sales; and the whole frame of these Acts negatives any equity resulting out of the doctrine of notice. An unregistered agreement, therefore, with the registered owner of a ship, which the owner subsequently transfers for value to another person who has notice of the agreement, cannot be enforced either as against the ship or its proceeds.

Whether upon such a contract an action for damages could be sustained, *quære*.

How far actual fraud in such a case would be relievable in equity, *quære*. *Mc Calmont v. Rankin*, 403

*See also* INJUNCTION, 3.**SHIP REGISTRY ACTS.***See* SHIPPING.**SOLICITOR.**

1. In an administration suit instituted by an infant *cestui que trust* under a will against the executors, one of the executors admitted that part of certain sums advanced by him on mortgage

mortgage formed part of the trust estate. An order was made in the suit for the completion of contracts for sales of the mortgaged property which had been entered into by the executor. Under this order the purchase-monies were paid into court to the credit of the cause. The order directed the executor to execute the conveyances, and deliver the title-deeds to the petitioners; but the executor's solicitors refused to give up the deeds claiming a lien upon them for costs due from the executor and advances made for the maintenance of the Plaintiff. *Held*, that the Court had jurisdiction on petition to order the solicitors to deliver up the deeds. *Francis v. Francis*, 73

. In an action brought by an attorney against his client, upon his bill of costs, the client obtained an order for taxation on the terms of withdrawing all his pleas except *nunquam indebitatus*. Afterwards he withdrew all his pleas, and applied to the Judge for an order of taxation, under the 6 & 7 *Vict.* c. 73, which was refused for want of jurisdiction. *Held*, that the client could not obtain an order for taxation from the Court of Chancery, there being no special circumstance beyond mere overcharge.

*Semble*, that where judgment has been given in the attorney's action, the special jurisdiction given by the 6 & 7 *Vict.* c. 73, s. 37, does not exist.

Where special circumstances are relied upon as a ground for taxation after the prescribed time they

must be such as the client could not have reasonably availed himself of sooner.

*Semble*, that mere overcharge is not a special circumstance within the meaning of the Act. *In re Barnard*, 359

3. A solicitor, who was the chief acting executor of a client, retained the amounts of his bills of costs, as solicitor of the testator and of the executors, out of assets received by him, and died. A suit was instituted for the administration of his estate. Twelve years after his death, and twenty years after the solicitor had ceased to act professionally for the executors of the testator, the testator's representative sought against the representatives of the deceased solicitor an order for the delivery and taxation of the solicitor's bills, under the 6 & 7 *Vict.* c. 73. *Held*, that whether the act gave jurisdiction to make such an order or not, such an order ought not to be made.

Executors retained the son of one of them to act as their solicitor in the administration of the estate, and the solicitor's bills, or some of them, were paid by credit being given to the son in accounts between him and his father. *Held*, that this fact was not such a special circumstance as would warrant an order for the delivery and taxation of the son's bills of costs, upon a petition presented under the 6 & 7 *Vict.* c. 73, ten years after the payment, even if that interval did not exclude the jurisdiction to make such

such an order. *Ex parte Shackell*, 842

*See also* BANKRUPTCY, 5, 18.

### SPECIFIC PERFORMANCE.

*See* SHIPPING.

VENDOR AND PURCHASER, 2.

### STATUTES.

7 *Geo.* IV. c. 57. *See* ASSIGNMENT.  
2 & 3 *Will.* IV. c. 100. *See* TITHES.  
3 & 4 *Will.* IV. c. 27. *See* TITHES;  
WILL, 8.

3 & 4 *Will.* IV. c. 104. *See* WIND-  
ING-UP ACTS, 4.

5 & 6 *Will.* IV. c. 76. *See* MUNICI-  
PAL CORPORATION ACT.

1 *Vict.* c. 26. *See* WILL, 5, 12.

5 & 6 *Vict.* c. 39. *See* PRINCIPAL  
AND AGENT.

6 & 7 *Vict.* c. 73. *See* SOLICITOR, 2, 3.  
12 & 13 *Vict.* c. 106. *See* BANK-  
RUPTCY, 7.

13 & 14 *Vict.* c. 60. *See* TRUSTEE  
ACT 1850.

14 & 15 *Vict.* c. 99. *See* PRACTICE,  
12.

15 & 16 *Vict.* c. 86. *See* PRACTICE.

### STATUTES, CONSTRUCTION OF.

*See* BANKRUPTCY, 11.

### SUPPLEMENT.

*See* PRACTICE, 4.

### TAXATION OF COSTS.

*See* SOLICITOR, 2, 3.

### THELLUSSON ACT.

*See* WILL, 4.

### TITHES.

The Act 2 & 3 *Will.* IV. c. 100, is unaffected by the provisions of the Act 3 & 4 *Will.* IV. c. 27; the interpretation clause of the latter Act, although enacting that the word "land" shall in its meaning extend to tithes, has reference to an estate in tithes, and not to tithes as a chattel, and the 2nd section, therefore, does not embrace the case of a render of tithes as a chattel by the person bound to pay to the tithe-owner. *The Dean of Ely v. Bliss*, 459

### TRADING.

*See* BANKRUPTCY, 5.

### TRUSTEE.

A breach of trust will constitute merely a simple contract debt, unless there is something in the creation of the trust to raise a liability on covenant against the trustee. *Adey v. Arnold*, 432  
*See also* BANKRUPTCY, 13, 16.  
PRACTICE.

### TRUSTEE ACT 1850.

1. *Semble*, that the Lords Justices intrusted by warrant under the sign manual to make orders in Lunacy, have jurisdiction to make a vesting order under the Trustee Act, where the heir of the survivor's trustee is of unsound mind; but for greater certainty, the Lord Chancellor made the order. *In re Waugh's Trust*, 279
2. Husband

2. Husband of executrix out of the jurisdiction, *held* to be a trustee within the Trustee Act 1850, s. 22. *Ex parte Bradshaw*, 900

## VENDOR AND PURCHASER.

1. If previously to the sale of a reversionary interest, the vendor and purchaser concur in ascertaining from persons of competent skill, and having knowledge of the property and of all the circumstances likely to influence its value, a well-considered estimate of what the property would be likely to fetch at a sale, and act on that opinion—*Semble*, that such a transaction would not be afterwards disturbed merely because other surveyors afterwards came to a different conclusion from that on which the parties acted. It is not necessary to give validity to such a sale that it should be made by public auction. But where, upon the sale by private contract of such an interest in leaseholds, nothing was done except obtaining the opinion of an actuary unacquainted with the local circumstances likely to influence the value, and in a suit to impeach the sale the purchaser was unable to show that he had given the full value, the sale was set aside. *Edwards v. Burt*, 55
2. Land was advertised to be sold in lots as freehold, subject to conditions, one of which was, that all objections to the title, not made

within a prescribed time, should be considered as waived; and another provided that any misstatement of the quality, tenure, outgoings, or other particulars, should be the subject of compensation. An objection to the title of one lot was taken after the prescribed time, that it was of copyhold tenure. It however appeared that, under a composition with the lord, the rights of the copyhold were such as to render the tenure hardly different from that of freehold. *Held*, that the misdescription did not form a ground for resisting a specific performance, although the decision might have been otherwise had the misdescription been wilful.

Another lot was described in the particulars as being sold with a certain reservoir and water-works, yielding a yearly rental of 60*l.*, exclusively of the land and buildings. An objection was taken after the prescribed time, and was supported by the fact that this rent arose from supplying with water certain houses separated from the reservoir by the property of strangers, over which the vendor had no right to carry it beyond a permissive right from year to year by payment of a rent. *Held*, that the description contained such a misrepresentation as to preclude the vendor from enforcing a specific performance; and that the objection was not one as to title, and therefore was not obviated by the stipulation as to time. *Price v. Macaulay*, 339

*See also* WILL, 10.

WILFUL

## WILFUL DEFAULT.

See PRACTICE, 7.

## WILL.

1. *J. M.* by his will devised the *Maytham Hall* estate, being of gavel-kind tenure, to trustees upon trust to sell a competent part for the payment of debts, and subject thereto upon trust for *P. M.* for life, and after his decease for the first son of *P. M.* for life, and after his decease for the first son of such first son and the heirs male of his body, and in default of such issue, for every other son of *P. M.* successively for the like interests and limitations, and in default of issue of the body of *P. M.*, or in case of his not leaving any at his decease, for *T. M.* for life, and after his decease for *T. G. M.* the eldest son of *T. M.*, for life, and after his decease for the first son of *T. G. M.*, and the heirs male of his body, and in default of issue of the body of the said *T. G. M.*, for every other son of *T. M.*, successively for the like estates and interests, and on failure of all such issue of the body of *T. M.*, upon trust for him his heirs and assigns for ever; *P. M.* never had any children: *Held*, that *P. M.* took an estate for life with remainder to his first unborn son, if such son had been born, and that all the remainders over were void: *Held*, also, that effect was to be given to the gift over to *T. M.* and his sons in default of issue of the body of

*P. M.*, &c. as an independent clause, and that it was consequently valid.

Although by the doctrine of cy pres or by implication as applied to the construction of a will, an estate may be carried otherwise than in the exact form and manner indicated by the testator, yet it must always be in favour of a class or part of a class of persons intended to be provided for by the testator.

In construing wills effect may in certain cases be given to the general interest at the expense of a particular interest, but this is not to be done without an actual necessity.

Where an estate is so limited to *A.* as would generally raise by implication an estate tail, but there are added limitations to the children of *A.* which are void for remoteness, it is not a general rule to reject these limitations as unimportant and to give to *A.* an estate tail, although cases may arise in which this would be done in favour of the clear intention of the testator.

The cases of *Pitt v. Jackson*, 2 Bro. C. C. 51, and *Nicholl v. Nicholl*, 2 W. Black. 1159, observed on.

Where there are gifts over which are void for perpetuity, and there is a subsequent and independent clause on a gift over which is within the line of perpetuity, effect cannot be given to such clause unless it will accord with previous valid limitations.

A gift



A gift over made in words comprising only one event will not be construed as made on two events, although in point of fact it may consist very reasonably of two branches, unless it is so expressed by the testator.

*J. M.* provided by his will that if *P. M.* or *T. M.* or any of their issue should become entitled to the *Jodrell* estate, then the trustees should stand seised of the devised premises upon trust for the next person entitled thereto under his will, as if the person so succeeding to the *Jodrell* estate were dead: *T. M.* died after the date of the will, and the testator, by a codicil, declared that his trustees should stand seised of the devised estates upon trust for his wife for life, and then upon the trusts declared by his will, subject to the declaration therein contained with reference to the *Jodrell* estate. On the death of the widow, *P. M.* came into possession of the *Maytham Hall* estate, being at that time entitled to a life estate in remainder in the *Jodrell* estate, the tenant for life of that estate being then living:—*Held*, first, that this was not such an interest in *P. M.* as fell within the intention of the shifting clause, and that it did not in that event come into operation. *Held*, secondly, on *P. M.* afterwards coming into possession of the *Jodrell* estate, on the death of the tenant for life, that then the *Maytham Hall* estate went over and became vested in the trustees of *J. M.*'s will. *Held*,

thirdly, on the construction of the clause generally, that its operation was not confined to one shifting, but that it operated toties quoties as regarded the parties named in it.

The *Jodrell* estate was limited under the will of *E. J.* to the use of *M. J.* for life, with remainder to the use of the sons and daughters of *M. J.* successively in tail, with remainder to the use of *S. M.* for life, with remainder to her sons and daughters in tail, with remainder to *P. M.*, son of *J. M.*, for life, with remainders to his sons and daughters in tail, with remainder to *T. M.*, another son of the said *J. M.*, for life, with remainders to his sons and daughters in tail, with divers remainders over. The will contained a proviso that if *P. M.* and *T. M.*, or either of them, their or either of their issue, or any other son or sons of the said *J. M.*, or his or their issue, should become entitled to an estate of freehold or inheritance in possession of or in the *Maytham Hall* estate belonging to *R. M.*, "so as to be in the possession or in the actual receipt of the rents and profits thereof," then and in that case the estates devised by her will should shift from the person so becoming entitled in manner therein mentioned. At the date of the will, *R. M.* was entitled to the *Maytham Hall* estate, partly in fee and partly as tenant in tail. The *Maytham Hall* estate was subsequently disentailed and devised, and so came to



- to the son of *T. M.* (who was then entitled in possession to the *Jodrell* estate), by limitation as a purchaser, and not by inheritance, or under the original limitations existing at the date of the testator's will. Whether, looking at the dealing with the *Maytham Hall* estate, it became vested in *T. M.* in such a manner as to make the *Jodrell* estate go over, *quære. Monypenny v. Dering*, 145
2. The words, "The said fourth schedule," in a will, *held* to mean "the said fifth schedule," upon a consideration of all the provisions of the will and of the state of the testator's property and family when the will was made, although the actual words involved no contradiction nor repugnancy to the other provisions of the will, except by making in one instance insufficient provision for the charges thereby created, having regard to the value of the property, and by making capricious and improbable dispositions, at variance with what appeared to be the general intention. *Hart v. Tulk*, 300
3. A testator bequeathed the interest of certain personal property to his wife for life; "at her death one half of the said property I give to my son *G. M.*, the remaining half to be equally divided between my two daughters and at their deaths such shares to be equally divided among their children respectively:" *Held*, that the son took an absolute interest in the moiety. *Scrivener v. Smith*, 399
4. By the marriage settlement of *A. B.*, the grand nephew of the testator, certain family estates were settled so as to give to the father of *A. B.* an estate for life and then an estate for life to *A. B.* himself, both these estates being subject to a term of years the trusts of which were to raise portions for younger children of the marriage to an amount in the whole varying according to the number of such children, and which in the events which happened was 40,000*l.* The testator by his will made a large provision for *A. B.*, and then reciting this settlement bequeathed to his executors a sum of 15,000*l.* on trust to invest and accumulate the income during the life of *A. B.*, but if *A. B.* should die within twenty years from his the testator's death then the accumulation to be continued for so long a time as would make up the twenty years, and upon the completion of the accumulation, on trust to stand possessed of the trust-monies to pay and apply the same or a competent part thereof in satisfaction of the portions and in exoneration of the settled estates, and subject thereto upon the trusts of the testator's residuary personal estate: the testator also provided that if before the expiration of the period of accumulation the accumulated fund should be sufficient to answer the aforesaid purposes, then the accumulation should cease. *A. B.* lived beyond twenty-one years from the testator's death; and at the expiration of twenty-one years, a sum

sum of 35,622*l.* was accumulated. A question being raised in reference to the application of this fund, proceedings were subsequently instituted for obtaining the opinion of the Court on the point, at which time the accumulations amounted to 43,643*l.* *Held*, that the case fell within the terms of the second exception contained in the second section of the *Thellusson* Act, and that the fund directed to be raised was applicable according to the trusts of the testator's will.

By the terms of the first exception in the second section of the Act, a grantor, settlor, or devisor, or other person or persons may make provision generally for the payment, not only of his own debts, but also of the debts of any other person: and the provision for raising portions for any child, &c. mentioned in the second exception, includes portions already created, and enables a grantor, settlor, or devisor to make the same provision for the children of other persons as for his own, except that as to the former they must be the children of persons who take an interest under "such conveyance settlement or devise" as is referred to in the clause.

The words "such conveyance settlement or devise" relate to the instrument by which the grantor, settlor, or devisor has made a provision for the portions, but it is not necessary that the gift to the parent should be in the very clause of the will which creates the provision for

the children, or that it should be an interest in the very property directed to be accumulated.

*Semble*, that however small the sum may be which is given to the parent, it would still be an interest within the meaning of the clause.

Cases may arise in which, although an interest be given to the parent and some provision afterwards made for the children, that provision may not be made in the way of portions so as to bring the case within the exception in question.

The cases of *Eyre v. Marsden*, 2 Keen, 564, and *Shaw v. Rhodes*, 1 Myl. & Cr. 135, and *S. C.*, on appeal, *sub nomine*, *Evans v. Hellier*, 5 Cl. & Fin. 114, observed upon. *Barrington v. Liddell*,  
480

5. Estates *A.* and *B.* were so settled that the testator had no power to deal with *A.*, but had a power of appointment over *B.* By his will, made after the 1 *Vict.* c. 26, he referred to the settlement and confirmed it, and, then reciting that he had considerable freehold estates and might become possessed of more, he devised all his real estates of which he might die possessed to certain persons as trustees for purposes totally different from those of the settlement: he had not at the date of his will or his death any other estates besides *A.* and *B.* *Held*, that the testator must be taken to have known that he had a power of appointment over estate *B.*, that the confirmation of the settle ment

settlement operated only upon the estate *A*, and that the devise was a good execution of the power.

Observations on the operation of the Act 1 *Vict.* c. 26, on devises in execution of powers. *Lake v. Currie*,

536

6. A testator by his will directed his trustees to purchase a sum of Bank Annuities, upon trust to pay the dividends to his son *John* for life, with a proviso against alienation, and he then provided that in case his said son should marry with the consent of his trustees, the annuities should subject to the life interest of his son be settled for the benefit of any woman with whom his son should intermarry, and the issue of such marriage in such manner as should be agreed upon with the concurrence of his trustees, and subject to the trusts to be declared in any settlement to be made on the marriage of his son, or in case none should be declared, then the Annuities should go as his son should by will appoint; and the testator also provided that in case his son should die unmarried, or having been married without leaving issue, and without having exercised the power of appointment thereby given to him, then a moiety of the Annuities should go to persons named in the will: the son died without ever having been married, and having by his will appointed a portion of the Annuities to two of his brothers. *Held*, sustaining this appointment, that in the events which had happened the son had a

power of appointment over the Annuities. *Sheffield v. The Earl of Coventry*,

551

7. A testator by his will gave certain annuities in the following terms: "I desire that my executors shall purchase annuities for each of my two sisters, *E. B.* and *E. F.*, of 100*l.* a year each, the said annuities to be purchased in the British Funds." After giving other annuities *simpliciter* and legacies, the testator added, "I direct my landed property at *O.* to be sold, and the produce to go to the carrying out of the aforesaid annuities and legacies; and should the produce of the said sale not be found sufficient for that purpose, I desire that the remainder shall be made up from my personal property;" and he directed the remainder of his personal property, "after the above annuities and all legacies have been paid and effected," to be laid out "in the purchase of an annual income in the 3*l.* per Cent. Consols," for the benefit of a hospital. *Held, dissentiente* Lord Justice Lord *Cranworth*, that the annuities to *E. B.* and *E. F.* were perpetual annuities. *Kerr v. The Middlesex Hospital*,

576

8. A testator devised his real estates to trustees, upon trust to pay certain annuities, which were to be increased in certain events, and a term of ninety-nine years was vested in other trustees, for better securing the annuities, and, subject thereto, the estates were limited to the testator's sons for life, with divers remainders

mainders over. The first tenant for life entered into possession, and soon afterwards the events happened by which the annuities were to be increased; the original annuities were regularly paid, but no payment was made in respect of the increased annuities; after the death of the tenant for life, and much more than six years after the period when such increased payments ought to have been made, a bill was filed by the annuitants to have the whole arrears raised out of the estate of the tenant for life, and by sale or mortgage of the term: *Held*, that the term being a subsisting term, on which the trustees might obtain possession, the case was within the saving of the 25th section of the Act 3 & 4 Will. IV. c. 27, and that the annuitant was not barred by the operation of the 42nd section of that Act from recovering the entire arrears.

The abstract question determined in *Hunter v. Nockolds*, 1 Mac. & G. 640, is unaffected by this decision, though in that case, as in this, the annuity was collaterally secured by a term of years, a circumstance which was not adverted to either in the argument or judgment. *Cox v. Dolman*, 592

9. A testator directed his executors to stand possessed of his personal estate, upon trust to invest a sufficient portion thereof in the funds, to produce an annuity of 2*l.* per week, to be paid to one of his sons, and that after his son's decease the sum to be so invested should fall

into the residue. He directed his executors, as soon as his youngest child should attain twenty-one, to divide his remaining estate amongst all his children, except the annuitant, equally, and directed that upon the decease of the annuitant, the sum invested to produce his annuity should be divided in like manner among all the testator's other children who should then be living, and the issue of such as should be dead, share and share alike. The income of the residuary estate was insufficient to pay the annuity. *Held*, that the annuitant was entitled to have the deficiency made up out of the capital, but not to have the annuity valued, and the amount of the valuation paid to him. *Wright v. Callender*, 652

10. A testator devised copyholds to such uses as *A.* and *B.*, or the survivors of them, his executors or administrators should appoint, and subject thereto to the use of *A.* and *B.*, their heirs and assigns for ever upon certain trusts; and he directed his said trustees to sell the copyholds as soon as conveniently might be. *Held*, that the trustees could make a good title to a purchaser without being admitted. *Glass v. Richardson*, 658

11. Bequests to the sons and daughters of *D.* of 200*l.* each, also to the children of a son of *D.* 200*l.*, to be equally divided among them, to be paid twelve months after the decease of the testator's widow: *Held* to be postponed as to all the bequests till after

after the widow's death. *Child v. Elsworth*, 679

12. The owner of an estate limited to the usual uses to bar dower, mortgages it in fee, and, by the proviso for redemption, the estate is agreed to be re-conveyed to him, his heirs, appointees, or assigns, or to such other persons, to such uses, and in such manner as he or they should direct. After executing this mortgage the testator made his will, devising the estate, and subsequently paid off the mortgage, taking a reconveyance to the same uses, in bar of the dower, as the estate was subject to before the mortgage, the dower trustee being the same person in both deeds. He died before the Wills Act came into operation. *Held*, that the will was not revoked as to the estate in question. *Plowden v. Hyde*, 684

13. A testator, by his will, after reciting that his two daughters by his first wife were amply provided for, and that he had nine children, whom he named, being three sons and six daughters, and that on the marriage of four of the six daughters, he had advanced certain sums, and that it was his intention to make similar provision for his two unmarried daughters, gave his real and leasehold property, upon trust, after his wife's death, to sell and divide the proceeds among all and every his children by his then wife, and directed that the trustees should, during the life of each of his *said children*, who should be a daughter, pay the income of her

share to her for her separate use, without power of anticipation. One of the nine children was illegitimate. *Held*, that she took equally with the others. *Owen v. Bryant*, 697

14. A testator domiciled in *England* and entitled to heritable bonds affecting lands in *Scotland*, made a will according to the English law, whereby, by virtue of every right, power, or authority enabling him in that behalf, he gave to trustees all his real and personal estate whatsoever and *wheresoever*, upon trusts for the benefit of his wife and all his children. The will was inoperative according to the Scotch law, for the purpose of passing the heritable bonds, for want of the word "dispone," in the devise and of a proper attestation clause, according to Scotch law. *Held*, that the heir-at-law was not put to his election, but might take the English property under the will without giving up the bonds. *Maxwell v. Maxwell*, 705

15. Under a bequest, (in the event of daughters dying without leaving issue,) in trust for the persons who would at the time of the decease of such daughters respectively, be entitled, as next of kin, *or otherwise*, to the personal estate of such daughters respectively, under the statutes made for the distribution of intestates' effects. *Held*, that the husbands of the daughters did not take. *Milne v. Gilbert*, 715

16. A bequest of the sum of 700*l.* unto and amongst *J. C.* and *C.* his wife,

wife, and *W. L.* in equal shares and proportions: *Held*, to give one moiety to *J. C.* and *C.* his wife, and the other moiety to *W. L.*, although the will, in another part of it, gave three legacies of 200*l.* each to each of them, *J. C.*, *C.* his wife, and to *L.* *In re Wylde*, 724

17. A testator gave the residue of his freehold, copyhold, and leasehold estates and all other his estate and effects, upon trust to pay the dividends and interest, rents, profits, and annual produce to *E. B.* for life with remainders over. This residue consisted of leasehold property, canal and insurance shares, and Dutch bonds. *Held*, that the tenant for life was entitled to enjoy the leaseholds in specie, but not the shares or Dutch bonds.

Under a bequest of residue, upon trust to pay the dividends of 1500*l.* stock to *A.* for life, and after her death to divide the dividends equally between *B.* and *C.* and the survivor of them. *Held*, (*dubitante* Lord Justice *Knight Bruce*) that the survivor only took an interest for life. *Blann v. Bell*, 775

18. Bequest of residue of personal estate to trustees, upon trust for *A.*; but if he should die in the testatrix's lifetime, "without leaving any child or children him surviving," then in trust for *B.* absolutely. *Held*, not to create a trust by implication for the children of *A.* on his death in the testatrix's lifetime. *Semble*, that it was a case of intestacy. *Lee v. Busk*, 810

## WINDING-UP ACTS.

1. A provisional committee-man of a provisionally registered Railway Company on the 9th of *October*, 1845, wrote to the secretary in answer to an inquiry made by the latter, as follows: "I should wish to have 100 shares reserved for me." Nothing further took place till the 21st of *November*, when the secretary wrote to the committee-man as follows: "The committee of management are of opinion that the payment of the deposit should be no longer delayed; they therefore request that you will be so good as to pay the deposit on the 100 shares accepted by you." On the 27th, the committee-man replied thus: "Inform me whether a sufficient amount of deposit has been paid up to enable the Company to go to Parliament this session, and if all the Provisional Committee have paid their deposits. Should that be the case, I shall not hesitate to pay also, that is, upon being clearly satisfied on these points." *Held*, that this was a conditional acceptance only, and the condition not having been performed, that the committee-man was not a contributory. *Mainwaring's Case*, 66
2. By the terms of a Joint-Stock Banking Company's deed of settlement, it was, among other things, provided that nothing in the deed contained should release a retiring member from his share of the losses sustained by the Company up to the period of his retirement, and also



also that the half-yearly balance sheets should, as between shareholders, be binding and conclusive. *A. B.*, a shareholder, duly transferred his shares, and the two balance sheets immediately preceding the transfer showed the affairs of the Company to be in a prosperous condition. Four months after the transfer the Bank suspended payment, and upwards of three years after that time an order was obtained for the winding up of the Company. The person who prepared the balance sheets deposed that there were in fact considerable losses sustained by the Company in the two years preceding the transfer: *Held*, nevertheless, and affirming the decisions of the Master and the Vice-Chancellor, that *A. B.* was not liable as a contributory. *Holme's Case*, 113

3. The testatrix was the owner of shares in a Joint-Stock Company, and appointed *R. H.* and *J. C.* her executors; *R. H.* was the acting executor, and the estate was wound up with the exception of the shares; the probate of the will was entered in the books of the Company; *R. H.* sold some of the shares and received the dividends on those which remained unsold, but *J. C.* never in any way communicated with the Company, or interfered in the matter. More than nine years after the death of the testatrix the Company failed, and on being wound up under the Winding-up Act, 1848, the Master placed the name of *R. H.* alone on the list of con-

tributories as personally liable; he subsequently, and after the passing of the Winding-up Amendment Act, 1849, reviewed his decision, and placed the names of both *R. H.* and *J. C.* on the list as liable in the character of executors: *Held*, on the application of *J. C.* to have his name taken off the list, that the 17th section of the Amendment Act was retrospective as well as prospective in its effect, and enabled the Master to review his former decision: *Held* also, that there was nothing in the facts of the case in reference to the dealings between the Company and *R. H.*, or in the provisions of the deed of settlement of the Company, that varied the rights of the Company in respect to the liability of *J. C.* to contribute in his character of executor. *Crosfield's Case*, 128

4. A testator devised and bequeathed all his real and personal estate, the latter consisting of, among other things, shares in a Joint-Stock Company, to his widow for life, and after her death, to his daughter absolutely; and he appointed them executrixes. The widow and daughter, as executrixes, received the dividends on the shares for several years. After the death of the widow, the Company was wound up under the Winding-up Acts: *Held*, that the daughter was rightly placed on the list of contributories in respect of her being devisee.

The Act 3 & 4 *Will.* IV. c. 104, charges the real estate of any person dying seised of such estates, not only

only with his debts of every description actually due at his death, but also with all liabilities which may result out of obligations entered into during his life. *Hamer's Devises' Case*, 366

5. The subscribers' agreement of an intended Railway Company provided that the committee of management might dissolve and wind up the affairs of the Company at any time before the Act of Incorporation was obtained; and under these powers the committee of management dissolved the Company, and proposed to return to each scrip-holder a certain amount of the deposit. Before such amount was received by any scrip-holder, he had to sign an assent to the cancellation of his scrip, and he became entitled to receive such further sum as the committee of management might declare payable after a final settlement of all claims upon the Company. The Company being subsequently wound up under the Winding-up Acts, a list of contributories divided into several classes, was settled, and a call was made for the costs incurred in the winding-up: *Held*, that the Master was not justified in making the call exclusively on that class of the contributories which included those scrip-holders who had received back part of the deposit, but that such class being entitled to participate in any further sum which might be declared payable, was liable, *pari passu*, with all the other contributories, to the call made to discharge the

expenses incidental to the winding up. *Preece and Evans's Case*, 374

6. *A. B.*, one of the directors of a Joint-stock Banking Company, was a subscriber for, and executed the deed of settlement in respect of, twenty shares of the Company, each director being obliged to hold twenty shares as a qualification. The directors subsequently resolved, without the privity of the shareholders, to appropriate to themselves a certain amount of additional or credit shares, which they were to pay for by giving promissory notes for the amount for which each subscribed. *A. B.* agreed to take, and he gave a promissory note in payment for 100 of such credit shares; he also signed a letter, binding himself to pay the deposit and calls on them, but did not execute the deed in respect of them. Eight years after the execution of the promissory note, *A. B.* died, without having paid any interest on, or any part of the principal of the promissory note, but in the books of the Company credit was given to him in respect of dividends on the credit shares, and he was charged interest upon the promissory note. On the Company being wound up: *Held*, that his executor was rightly placed on the list of contributories, ~~not only~~ in respect of the twenty shares, but also in respect of the 100 credit shares, although the creation of the credit shares was not warranted by the deed, nor were they in fact ever



issued or allotted. *Robinson's Executors' Case*, 517

7. *C. D.*, one of the directors of a Joint-stock Banking Company, was a subscriber for, and executed the deed of settlement in respect of twenty shares of the Company, each director being bound to hold that number as a qualification. The directors subsequently resolved, without the privity of the shareholders, to appropriate among themselves a certain amount of additional or credit shares, which they were to pay for by giving promissory notes for the amount for which each subscribed. *C. D.* agreed to take 500 of such additional shares and gave his promissory note, payable in five years, for the amount; he also signed a letter, binding himself to pay the deposit and calls on them, but did not execute the deed in respect of them. He died three months afterwards. Within one month from the date of his death, his executors applied to the directors of the Company to ascertain the extent of his interest in, or liability to, the Company. In answer to this application, they were informed that their testator held twenty shares, which were thereupon duly transferred to a purchaser; the directors afterwards cancelled the 500 credit shares and the promissory note. Eight years after the death of *C. D.*, the Company was wound up. *Held*, that the executors of *C. D.* ought not to be placed on the list of contributories; and that, although his estate might

have been bound if the claim had been promptly asserted at the instance of the shareholders, yet that so long after the distribution of his assets, the loss resulting from the misrepresentation of the directors must fall upon themselves and the Company, and not upon the estate of *C. D.* *Meux's Executors' Case*, 522

8. A transferee of shares in a Joint-stock Banking Company, *held*, on the winding-up of the Company, to be liable as a contributory in respect of debts incurred as well before as after the transfer, there being no provisions in the deed of settlement of the Company in any way limiting such liability. *Cape's Executor's Case*, 562
9. Under an order for winding up a Company under the Joint-stock Companies Winding-up Acts, the Master has no jurisdiction to admit a claim of a creditor of some members only of the association directed to be wound up, although the debt may have been contracted for the purposes of the association. *Wryghte's Case*, 636
10. A director of an abortive provisionally registered railway Company presented a petition to have it wound up, and obtained the usual order with the concurrence or without opposition from the other directors, who were themselves prepared and who intended to take the same step if the petitioner did not. Two years afterwards, and after large expenses had been incurred in unsuccessfully

successfully attempting to retain other persons upon the list of contributories, four of the other directors sought to discharge the winding up order.

*Held*, that they could not be heard to allege that the order had been wrongly obtained.

*Held* also, that they were liable to contribute to the costs incurred under the winding-up order, and

that a call had been properly and not prematurely made for that purpose, although there had been no adverse taxation of the costs.

In making a call for the costs of winding up, it is a legitimate course to apportion the amount according to the number of shares. *Ex parte Woolmer*, 665

*See also* CLUB.















